WORLD TRADEORGANIZATION
WT/DS18/AB/R
20 October 1998
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AUSTRALIA – MEASURES AFFECTING IMPORTATION
OF SALMON
AB-1998-5
Report of the Appellate Body

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WORLD TRADE ORGANIZATION
APPELLATE BODY
Australia - Measures Affecting Importation of
Salmon
Australia, Appellant/Appellee
Canada, Appellant/Appellee
European Communities, India, Norway and the
United States, Third Participants
AB-1998-5
Present:
Ehlermann, Presiding Member
Beeby, Member
El-Naggar, Member
I.Introduction
1. Australia and Canada appeal from certain issues of law and legal interpretations in the Panel
Report, Australia - Measures Affecting Importation of Salmon.
1
 The Panel was established to
consider a complaint by Canada regarding Australia's prohibition on the importation of fresh,
chilled or frozen salmon from Canada under Quarantine Proclamation 86A ("QP86A")
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, dated
19 February 1975 and any amendments or modifications thereto.
2. Before the promulgation of QP86A on 30 June 1975, Australia imposed no restrictions on the
importation of salmonid products. QP86A "prohibit[s] the importation into Australia of dead fish
of the sub-order Salmonidae, or any parts (other than semen or ova) of fish of that sub-order, in any
form unless: [...] prior to importation into Australia the fish or parts of fish have been subject to
such treatment as in the opinion of the Director of Quarantine is likely to prevent the introduction
of any infectious or contagious disease, or disease or pest affecting persons, animals or plants".
Pursuant to QP86A and in accordance with the authority delegated therein, the Director of
Quarantine has permitted the entry of commercial imports of heat-treated salmon products for
human consumption as well as non-commercial quantities of other salmon (primarily for scientific
purposes) subject to

1WT/DS18/R, 12 June 1998.
2Quarantine Proclamation No. 86A, Australian Government Gazette, No. S33, 21 February 1975.

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prescribed conditions.
3
 Canada requested access to the Australian market for fresh, chilled or
frozen, i.e., uncooked, salmon. Australia conducted an import risk analysis for uncooked, wild,
adult, ocean-caught Pacific salmonid product ("ocean-caught Pacific salmon"). This category of
salmon is to be distinguished from the other categories of salmon for which Canada seeks access to
the Australian mar f34f f fýiscesnÝTjtrmory/Fo o o.442

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 The relevant factual aspects of this dispute are set out in greater detail in the Panel Report, in
particular, at paragraphs 2.1 to 2.30 as well as at paragraphs 6.1 to 6.157 and Annex 2, which deal
with the Panel's consultation with scientific experts.
3. The Panel Report was circulated to the Members of the World Trade Organization (the
"WTO") on 12 June 1998. The Panel found that Australia has acted inconsistently with Articles
5.1, 5.5 and 5.6 and, by implication, Articles 2.2 and 2.3 of the Agreement on the Application of
Sanitary and Phytosanitary Measures (the "SPS Agreement"). In paragraph 9.1 of its Report, the
Panel reached the following conclusions:
 (i)Australia, by maintaining a sanitary measure which
is not based on a risk assessment, has acted (both in so far as
the measure applies to salmon products at issue from adult,
wild, ocean-caught Pacific salmon and the other categories
of salmon products in dispute), inconsistently with the
requirements contained in Article 5.1 of the Agreement on
the Application of Sanitary and Phytosanitary Measures and,
on that ground, has also acted inconsistently with the
requirements contained in Article 2.2 of that Agreement;
 (ii)Australia, by adopting arbitrary or unjustifiable
distinctions in the levels of sanitary protection it considers to
be appropriate in different situations (on the one hand, the

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Page 34 In paragraph 9.2 of its Report, the Panel made the following recommendation: We recommend that the Dispute Settlement Body request Australia
to bring its measure in dispute into conformity with its obligations
under the Agreement on the Application of Sanitary and
Phytosanitary Measures.
4. On 22 July 1998, Australia notified the Dispute Settlement Body (the "DSB") of its decision to
appeal certain issues of law covered in the Panel Report and certain legal interpretations developed
by the Panel, pursuant to paragraph 4 of Article 16 of the Understanding on Rules and Procedures
Governing the Settlement of Disputes (the "DSU"), and filed a notice of appeal
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 with the Appellate
Body pursuant to Rule 20 of the Working Procedures for Appellate Review (the "Working
Procedures"). On 3 August 1998, Australia filed an appellant's submission.
11
 On 6 August 1998,
Canada also filed an appellant's submission.
12

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indicate the specific measures that might be at issue. According to Australia, Canada "did not
clarify" the measure at issue in its first written submission, while Australia's first submission did,
by contesting Canada's claim about the measure, and by asserting that the measure at issue is the
December 1996 Decision of the Director of Quarantine. Since the differences between the parties
on this matter were apparent from the beginning, Australia considers that the Panel's terms of
reference required it to first examine conflicting claims of fact, which otherwise, could lead to
wrong factual presumptions.
2. On a more substantive point, Australia argues that the Panel exceeded its terms of reference in
respect of "both the product covered and the applicable quarantine measures for consideration".

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Australia argues that the Panel "construed a 'doubt' about the 'strictness' of Australia's approach to
internal controls on movement of salmon products" on the basis of "an uncollaborated reference" to
Article 6. According to Australia, this "suggests that the Panels 'doubt' was based on an implied
finding of inconsistency with Article 6", a provision not included in the Panel's terms of reference.
2.

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Burden of Proof
1. Australia contends that the Panel failed to properly assess, in its consideration of the evidence
before it, whether Canada had discharged its burden of proof in relation to Articles 5.1, 5.5 and 5.6
of the SPS Agreement. In particular, Australia asserts that Canada failed to raise a prima facie
presumption on the following claims: that the SPS measure at issue is not based on a risk
assessment; that the different situations the Panel examined are comparable on a scientific basis;
that the SPS measure is unjustified; that there is a causal connection between the arbitrary or
unjustifiable distinction in levels of sanitary protection and resultant discrimination or disguised
restriction on international trade; that there are alternative measures available which are
economically and technically feasible; and that at least one of these alternative measures could
meet Australia's appropriate level of protection.
2. Australia argues that the Panel did not require directly relevant scientific data to support
Canadian assertions, and thereby created an imbalance in the evidentiary standards demanded of
the complainant and respondent. According to Australia, while the Panel "superficially" adopted
the interpretative approach of the Appellate Body in EC Measures Concerning Meat and Meat
Products (Hormones) ("European Communities - Hormones")
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, it failed to follow the
interpretative guidance provided by the Panel Reports in the same case.
17
 It maintained a
conceptual approach to the SPS Agreement modelled on Article III and Article XX of the GATT
1994 in regard to its interpretations of the provisions of Articles 5.1, 5.5 and 5.6 and by
association, Articles 2.2 and 2.3, even in the manner of allocating the burden of proof.
3.Objective Assessment of the Matter
1. Australia asserts that a corollary of the requirement that a prima facie case be made out and that
a panel not undertake a de novo review, is that a panel should accord due deference to certain
matters of fact put forward by parties to a dispute. The Panel was obliged under WTO
jurisprudence and rules of customary international law to give due deference to certain evidence
put before it by Australia. Its failure to do this, according to Australia, is evident in its treatment of
Australia's determination of its appropriate level of protection, Australia's characterization of the
legal status and application of its own SPS measures, and Australia's domestic practices and
processes in risk assessment including the role of draft reports and recommendations as part of the
risk communication stage.

16Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R.
17Adopted 13 February 1998, WT/DS/26/R/USA and WT/DS48/R/CAN.

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2. According to Australia, the Panel partially or wholly ignored relevant evidence placed before
it, or misrepresented evidence in a way that went beyond a mere question of the weight attributed
to it, but constituted an egregious error amounting to an error of law.
4.Other Procedural Matters
1. Australia and Canada were informed by the Panel that all evidence were to be submitted by
7 October 1997. According to Australia, the Panel erred in law by permitting Canada to submit
evidence of a scientific nature until 5 February 1998 and by drawing on some of this evidence in
reaching its findings. This evidence includes, in particular, two versions of an import risk analysis
by David Vose. Australia further complains that the Panel considered evidence on the effect of
low-range heat treatment on the growth of disease pathogens which Canada referred to in its oral
statement at the second substantive meeting with the Panel but which it never submitted.
2. Australia asserts that at the second substantive meeting, the Panel denied Australia the right to
submit a formal written rebuttal submission to Canada's oral statement which raised many "new
matters". Its grant of one week for a written comment limited to specific matters was not sufficient
to fully address the substantive issues raised in the statement, in accordance with the time periods
provided by the Working Procedures of Appendix 3 of the DSU.
5.Article 5.1 of the SPS Agreement
1. Australia claims that the Panel's finding of a violation of Article 5.1 is fundamentally flawed as

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methods ...". Clearly, a process method is only "relevant" if it is actually used in producing the
product to be imported in fresh, chilled or frozen form. Thus, if a process method embodied in a
"measure" is not a relevant process method for fresh, chilled or frozen salmon, there is no
obligation on WTO Members to assess that process method. According to Australia, there is no
basis in the SPS Agreement for concluding that for a measure to be based on a risk assessment, it
is required that the risk be assessed on a process method which does not have application to the
product at issue. To suggest that a risk assessment on heat treatment could provide the basis for an

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terms of the treaty. This has led the Panel into serious legal error in failing to examine the
consequences of disease entry, establishment or spread.
4. According to Australia, the Panel failed to establish that there were sufficient elements in
common with regard to the biological and economic consequences for Australia's salmonid
population which will arise from the importation of salmonid species vis-à-vis those from widely
different species of other aquatic animals. Evidence and scientific opinion were disregarded by the
Panel because they were extraneous to the Panel's oversimplified examination which did not take it
beyond a "concern" for the aquatic environment in general, and a view that there might be more
risks associated with the importation of non-salmonid species than previously understood.
5. Australia asserts that the Panel, in determining that its examination of "arbitrary or unjustifiable
distinctions in levels of protection in different situations" must be limited solely to disease agents
positively detected, failed to interpret those terms in their proper context. The Panel thereby
diminished Australia's WTO right to adopt a cautious approach in determining its own appropriate
level of protection. The Panel has, therefore, failed to observe the provisions of Articles 3.2 and
19.2 of the DSU.
6. Australia argues that the Panel misused the statement in paragraph 215 of the Appellate Body
Report in European Communities - Hormones to justify its use of arbitrary distinctions in levels of
protection as a "warning signal" in the third test of Article 5.5. Not only has it erred in effectively
using this single element in three different guises in three of its "warning signals" and "other
factors", but it has gone beyond using it as a "warning signal" that something "might" be the case,
and given it greater and inappropriate evidential weight by including it among signals and factors
which "considered cumulatively", create a presumption of a legal violation.
7. Australia asserts that an adverse finding under Article 5.1 does not provide any evidence of a
"disguised restriction on trade" resulting from arbitrary or unjustifiable distinctions in the levels of
protection under Article 5.5, nor should it presume or pre-empt a finding under Article 5.5. Any
such interpretation would negate any burden of proof on the complainant to establish a
presumption in regard to the three elements of Article 5.5 and would not provide any scope for
rebuttal by the respondent. Furthermore, such an interpretation would fail to give effect to all the
terms of the treaty, and would vitiate the role of Article 5.5 as an additional obligation to that
imposed by Article 5.1.
8. Australia claims that the first of the "other factors" cited by the Panel, referring to "two
substantially different implementing measures" which involve "discrimination" between products,

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is based on an inappropriate analogy to Article III of the GATT 1994 and is a manifest factual
inaccuracy. Furthermore, according to Australia, the Panel erred if it is applying an interpretation
of discrimination based on Article III of the GATT 1994, rather than applying an interpretation in
the sense of Article 2.3 of the SPS Agreement, i.e., discrimination between different WTO
Members or between Australia and Canada "where identical or similar conditions prevail".
9. According to Australia, the Panel mischaracterized the difference between the recommendation
of the 1995 Draft Report and the recommendation of the 1996 Final Report as a "change" and a
"rather substantial change in conclusions". It incorrectly accorded a draft recommendation the
status of an SPS measure and erroneously adhered to a view that the only way to justify a
difference between draft recommendations and final recommendations under the SPS Agreement
is by new scientific evidence. In this context, the Panel refused to consider relevant evidence
submitted by Australia on re-evaluation of data and the role of draft reports and recommendations
as part of the transparency of the practices and processes of government. Australia asserts that
there is no SPS provision that requires a WTO Member to implement draft recommendations
absent new scientific evidence.
10. Australia contends that the Panel is in legal error in implying that, with regard to one disease,
epizootic haematopoietic necrosis ("EHN"), which is endemic in certain regions of Australia, but
exotic to others, consistency with Article 5.5 requires either restrictions on the internal movement
of salmon products within Australia, or alternatively, that Australia apply import zoning to grant
access to Canada. The Panel did not identify any legal requirements in Article 5.5 in this regard, or
in any other part of the SPS Agreement, although it noted the provisions of Article 6 in a footnote.
The Panel did not claim that Australia's internal controls are in violation of Article 5.5 or any other
provision of the SPS Agreement, but used this claim as somehow constituting factual evidence of
the existence of a disguised restriction on trade without providing any relevant argument to support
this claim.
7.Article 5.6 of the SPS Agreement
1. Australia claims that the Panel has erred in law in the way it has applied the three-pronged test
to establish inconsistency with Article 5.6. According to Australia, no evidence was presented to
indicate that the 1996 Final Report considered four alternative quarantine policy options as
"reasonably available taking into account technical and economic feasibility". The
1996 Final Report did not address this issue, as it concluded that the options would not achieve
Australia's appropriate level of protection.

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2. Furthermore, Australia argues that the Panel "has incorrectly characterized the measure which
currently achieves Australia's appropriate level of protection in determining that this level can be
met by certain heat treatment conditions." Heat treatment does not constitute the level of
protection for fresh, chilled or frozen salmon. Australia also contends that it never claimed that the
difference between the alternative quarantine policy options was "only a minimal, if any,
difference".
B.Canada - Appellee
1.Terms of Reference
1. Canada posits that the Panel’s inquiry could not be confined to the 1996 Decision of the
Director of Quarantine because it is too narrow in scope as it applies only to ocean-caught Pacific
salmon, as it takes effect only from 13 December 1996 and as it is only one element of the measure
at issue. The 1988 Conditions fell, by Australia's own admission, within the terms of reference
since these Conditions were implemented pursuant to QP86A, the instrument Australia describes as
"the legal framework for the authority to determine the 1988 Conditions". If the 1996 Decision is
the only measure at issue, then the Panel would have had to find Australia in violation of Article XI
of the GATT 1994.
2. Canada claims that Australia was at all times well aware of the case against it, including the
measure that was being challenged and the claims of violation that Canada was making in respect
of that measure. Canada and Australia had been engaged since 1975 in discussions about
Australia’s denial of access to Canadian fresh, chilled or frozen salmon. The request for a panel

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that product. What is also abundantly clear is that fresh, chilled or frozen salmon is not permitted
entry into Australia because it is not heat-treated in accordance with the prescribed temperatures
and heat duration periods.
4. Australia alleges that the Panel exceeded its terms of reference by examining the consistency of
Australia’s measure with Article 6 of the SPS Agreement. According to Canada, the Panel did no
such thing. It merely cited Article 6 in a footnote and did not "examine the consistency of the
measure" with Article 6.
2.Burden of Proof
1. Canada asserts that Australia’s claims that Canada did not establish a prima facie case of
violation by Australia of Articles 5.1, 5.5 and 5.6 of the SPS Agreement are unsubstantiated and
without merit. Its allegations of Panel error are in fact allegations that the Panel has not made an
objective assessment of the matter before it, including an objective assessment of the facts. This is
an extremely serious allegation. It demands that Australia provide full and convincing evidence.
Australia comes nowhere near to meeting this standard.
2. Canada claims that Australia misconceives the meaning of the evidentiary standard of prima
facie by considering that a prima facie case exists when "subject to rebuttal, a panel could find
that it is more probable than not that each element of the claim can be satisfied according to each of
the Articles under which the claim has been brought". According to Canada, the Panel correctly

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1. Canada asserts that, as Australia itself acknowledges, the Panel did allow it to make a third
written submission regarding its allegations that Canada had made new "claims" at the second
substantive meeting. Australia appears to be arguing that it has nevertheless been denied due
process. All of the so-called new claims are new arguments, as the Panel correctly pointed out.
Throughout

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this dispute, the Panel extended deadlines and made accommodations to meet Australia’s
objections that it did not have adequate time to prepare.
2. Due to Australia’s objections, the Panel held that the Vose Report was "not crucial to our

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2. The key point before the Panel, in Canada's view, was that despite the absence of evidence that
dead, eviscerated, fresh, chilled or frozen salmon for human consumption has ever introduced
disease anywhere, and that the risk of such introduction was extremely low, Australia closes its
market. By contrast, when faced with the knowledge that many of the same disease agents are
entering Australia, through fish products other than salmon, Australia allows the fish products in,
because it claims not to know the likelihood that those disease agents would infect the Australian
salmonid population or the consequences if they did. In other words, Australia adopts two
diametrically opposed levels of protection.
3. Canada claims that contrary to Australia's assertions, the Panel did consider "potential

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used as bait and live ornamental finfish - for which Australia’s differing measures seemed the most
egregious. This was because, as the Panel's experts noted, the importation of live ornamental fish
and bait fish are generally considered to pose higher risks of introducing exotic disease agents than
does the importation of dead fish for human consumption. Moreover, as the experts noted, there
has never been a recorded case of dead, eviscerated fish, such as the salmon that Australia
prohibits, resulting in an exotic disease introduction. By contrast, there are many such documented
introductions in the case of live fish, even in Australia.
6. Canada states that when it comes to the risks of disease introduction that non-salmonid imports
(particularly live fish, bait fish, and other fish for human consumption) pose to Australia’s
salmonids, Australia demands that Canada provide not just evidence, but proof of risk. However,
in the case of salmonid imports, despite the strong evidence that the risk is negligible, Australia
imposes an import ban "just in case".
7. Canada submits that the evidence regarding all three elements of Australia’s Article 5.5
violation is as compelling as one is ever likely to find, not only insofar as the measure applies to
ocean-caught Pacific salmon, but to all fresh, chilled or frozen salmon products covered by the
measure. If the evidence in this case is insufficient to support a finding that Australia violated
Article 5.5, it is difficult to conceive of circumstances in which a Member could prove an Article
5.5 violation.
7.Article 5.6 of the SPS Agreement
1. Canada asserts that although Australia contends that the 1996 Final Report concluded that the
other quarantine policy options it identified (Options 2-5) would not meet Australia’s appropriate
level of protection, there is nothing in the 1996 Final Report to sustain this assertion. A review of
the Panel Report, and the 1996 Final Report, reveals that this conclusion applies, if at all, only to
the two options rejected ab initio - removal of all quarantine restrictions or a ban on all salmon
imports - which the 1996 Final Report found could not "reasonably be considered as appropriate,
having regard to associated quarantine risks".
2. According to Canada, Australia implies illogically that the only measure in place that actually
achieves the prohibition on fresh, chilled or frozen salmon - heat treatment - does not achieve
Australia’s appropriate level of protection, while the prohibition itself does. Also, by stating that
its appropriate level of protection is "explicit" in the prohibition itself, Australia appears to be
suggesting that the appropriate level of protection is the prohibition. The language of Article 5.6
makes perfectly clear that a measure is not the appropriate level of protection.

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Canada - Appellant
1.Product Coverage
1. Canada asserts that the Panel’s failure to make findings under Articles 5.5 and 5.6 for salmon
products other than ocean-caught Pacific salmon was based on a misapplication of the "principle of
judicial economy" as set out by the Appellate Body in United States – Shirts and Blouses
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 and led
to a result contrary to Article 3.7 of the DSU. Moreover, the Panel’s approach had the perverse
result of subjecting a Member’s measure to less scrutiny the more overt its violation of its SPS
obligations. In the alternative, Canada submits that the Panel’s limited consideration of Articles
5.5 and 5.6 was based on justifications at odds with the ample evidence before the Panel, thereby
constituting a violation of Article 11 of the DSU.
2. According to Canada, if making a ruling on one claim will sufficiently determine the course of
implementation so as to secure a positive solution to the dispute, it would be redundant for a panel
to proceed further. However, a panel that addresses certain claims but declines to address others
that would better frame the course of implementation will not necessarily have resolved the matter
in dispute. An implementing Member may be able to implement in such a way as to bring its
measure into conformity in respect of the claims addressed by the panel, but not in respect of the
other claims that the panel did not address. The matter would not be resolved in respect of those
other claims and the complaining Member would be forced to bring another case to address them.
Hence, the "judicial economy" sought by the panel would be a false economy.
3. Canada claims that the Panel's decision in the present case to limit its findings to ocean-caught
Pacific salmon was not a decision to address certain claims. Rather, it was a decision to address
only one of the product categories, namely ocean-caught Pacific salmon, in respect of which
Canada had claimed a violation of the two articles in question. Given that neither Australia’s
measure nor the scope of the dispute was limited to ocean-caught Pacific salmon but, rather,
extended to all fresh, chilled or frozen salmon, and having found that in order to resolve this
dispute it was appropriate and necessary to consider Canada's Articles 5.5 and 5.6 claims for
ocean-caught Pacific salmon, it logically follows that it was appropriate and necessary to do so in
respect of all the salmon products covered by the measure. By omitting to do so, the Panel failed
to resolve the matter at issue in the dispute. Canada argued that the findings of the Panel under
Articles 5.5 and 5.6 with regard to ocean-caught Pacific salmon could be extended to other
Canadian salmon.

19Adopted 23 May 1997, WT/DS33/AB/R.

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Article 2.3 of the SPS Agreement
1. Canada asserts that it presented evidence to support its independent Article 2.3 claim - that
although Australia bans the importation of uncooked salmon from Canada ostensibly to prevent the
entry and establishment of exotic diseases, it does not control the movement of salmon within
Australia from states with, to states without, certain diseases. However, the Panel decided that it
was "more appropriate in the circumstances of this dispute to first deal with Canada’s claims under
Article 5" and when it considered Article 5.5, it did so only in respect of ocean-caught Pacific
salmon. It was on the ground of having found a violation of Article 5.5 that the Panel found
Australia also inconsistent with the requirements of Article 2.3. The Panel’s finding on Article 2.3,
therefore, was limited to ocean-caught Pacific salmon as the Panel declined to "further examine
Canada’s other claims under Article 2".
2. According to Canada, the Panel erred in applying the first sentence of Article 2.3 as an
afterthought to its analysis of Article 5.5. It erred in interpreting the first sentence of Article 2.3
only as preambular language and examining it solely through Article 5.5, and not as an
independent obligation. It compounded this error by inappropriately confining its analysis and
finding to ocean-caught Pacific salmon rather than considering all categories of salmon at issue. In
doing so the Panel disregarded its terms of reference and the evidence placed before it.
3. Canada claims that the Panel’s interpretation has the effect of emasculating Article 2.3, first
sentence. It violates customary rules of interpretation of public international law and offends the
principle articulated by the Appellate Body Report in United States – Standards for Reformulated
and Conventional Gasoline ("United States – Gasoline")
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 that the interpreter must give effect to
all the terms of a treaty. It also runs afoul of the admonition in Article 3.2 of the DSU that
"recommendations and rulings of the DSB cannot add to or diminish the rights and obligations
provided in the covered agreements". It fails to secure a positive solution to the dispute.
D.Australia - Appellee
1.Product Coverage
1. Australia asserts that the lighter scrutiny by the Panel of farmed salmon vis-à-vis ocean-caught
Pacific salmon was not a matter of legal error, but was caused by the failure of Canada to present
legal claims and arguments relevant to all of the salmon categories, which effectively invited the

20Adopted 20 May 1996, WT/DS2/AB/R.

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Panel to engage in "product splitting" in its examination of claims. According to Australia, Canada
is wrong in asserting that the Panel can find inconsistency on the basis of a limited category of
products in respect of some of the elements forming part of the obligations of Articles 5.5 and 5.6
and can thereby extend those findings to another category of products, thus avoiding the need to
establish a prima facie case in respect of all elements of the obligations with respect to the latter
products.
2. In Australia's view, there was, contrary to what Canada contends, no "ample evidence" before
the Panel in respect of other categories of salmon, since most of the studies referred to by Canada
are of a general nature or are based on late or unsubmitted evidence.
2.Article 2.3 of the SPS Agreement
1. According to Australia, Canada's appeal in respect of Article 2.3, first sentence, is based on a
mischaracterization of the Panel's findings of violation under Article 5.5. The Panel did not find a
violation of Articles 5.5 and 2.3 because Australia applies different measures on domestic salmonid
product and imported salmon. Hence, all of Canada's arguments relating to internal and external
controls are irrelevant to the matters under appeal.
2. Australia argues that the notion of Article 2.3 as an independent obligation would conflict with
the ordinary meaning of the terms in their context. Canada has not explained why its claims of
error should not have equal application to the obligations expressed in the second sentence of
Article 2.3, or for that matter in regard to the provisions of Articles 2.2 and 5.1.
E.Arguments by the Third Participants
1.European Communities
1. The European Communities states that the Panel's limitation of the products examined to
ocean-caught Pacific salmon is not justified by the principle of judicial economy. However, it is
not clear that the Panel was in a position to examine claims in respect of the other categories of
salmon. Therefore, it did not make a finding not because such was not necessary but because it did
not have the necessary evidence to make a finding.
2. The European Communities observes that the Panel appears to have made a very peculiar
application of the principles governing the allocation of the burden of proof. The claim that
"disguised restriction of trade" is evidenced by the absence of similar restrictions on the internal
movement of salmon was raised by, and therefore had to be substantiated by, Canada. If, despite

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the evidence submitted by Canada, the Panel still had "doubts" on the factual accuracy or relevance
of this claim to the third element of Article 5.5, it should have dismissed the claim.
3. The European Communities also states that the frequent resort by the Panel, in its examination
of Article 5, to the use of assumptions rather than making definitive findings is an extreme and
undesirable use of judicial economy. This approach is not conducive to the resolution of disputes.
4. The European Communities argues that the normal meaning of "potential" and "likelihood" is
different - "likelihood" implies a higher degree of probability than "potential". However, the
object, purpose and context of the SPS Agreement indicate that no greater level of probability
could have been intended for the first type of risk assessment than for the second type as defined
by paragraph 4 of Annex A of the Agreement. There is no reason why SPS measures against pests
and diseases will be more stringently examined than those against health risks from additives,
contaminants, etc.
5. The European Communities also states its concern that the panel might be misconstrued to
have stated that a "zero risk" level of protection is not a choice open to Members under the

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negation of the principle of judicial economy since its logic would always require all claims to be
examined.

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8. The European Communities contends that the Panel's consideration of the "difference in the
degree of risk" in the context of the second element of Article 5.5 is wrong because such is not a

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those that were evaluated and found effective in the risk assessment; and iii) a finding regarding
whether the applied measure is necessary to achieve the importing Member's level of protection.
4. Norway contests Australia's claims that the Panel is creating a new legal obligation, by
determining that diseases not detected cannot be validly taken into account for the purpose of a
Member's appropriate level of protection. In Norway's view, if Australia's contention is correct, a
Member would be permitted to adopt an SPS measure without having to identify a risk. Norway
thinks that it is clear from the definition of Annex A, paragraph 1, of the SPS Agreement that SPS
measures relate to protection from risks; therefore, if no risk has been identified with respect to a
specific import, no SPS measure can be applied.
5. Norway argues that if one were to accept Australia's claim that the measure is an import ban,
then the question becomes one of determining whether any of the identified alternative measures,
reasonably available, is sufficient to reduce risk to the "very low levels" demanded by Australia.
The 1996 Final Report does not make a clear evaluation and determination in this regard, and this
lack of evaluation may in itself be a violation of the substantive requirements of a risk assessment
under Article 5.1.
6. Norway asserts that the Panel should take the obligations in Article 2 as its point of departure,
since they encompass the "Basic Rights and Obligations." This is because the crux of the matter is
whether the Australian measure is "necessary" to achieve its level of protection, whether it is based
on scientific principles and sufficient scientific evidence, and/or whether the measure amounts to
an unjustifiable restriction on international trade.
4.United States
1. The United States asserts that Australia’s argument ignores the fact that heat treatment was
evaluated in Australia’s 1996 Final Report, as well as in the 1995 Draft Report, alongside other
measures with relation to fresh, chilled or frozen salmon.
2. Ironically, according to the United States, Australia cites comments by the experts noting that
Australia’s heat-treatment requirement effectively changes - i.e., destroys - the product, as support
for its claim that heat treatment is not applicable to fresh, chilled or frozen salmon. This is like
asserting that a requirement that concrete blocks be pulverized to dust before importation is a

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that the character of fresh, chilled or frozen salmon be destroyed so that the resulting product is no
longer "fresh, chilled or frozen".

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3. The United States argues that if the Panel limited its analysis to ocean-caught Pacific salmon
based on the interest of judicial economy, that principle was misapplied as it resulted in a failure of
the Panel to resolve completely the matter at issue in the dispute. This is not a situation where a
Panel properly elected not to consider all of the arguments or claims presented by a party. Instead,
the Panel in this proceeding failed to extend the analysis to all fresh, chilled or frozen salmon
which is the subject of Canada’s panel request.
4. The United States asserts that Australia implemented a ban to address the possibility that

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III.Issues Raised in this Appeal
1. The appellant, Australia, raises the following issues in this appeal:
(a)whether the Panel failed to interpret correctly its terms of reference with respect to
the measure and the product at issue;
(b)whether the Panel exceeded its terms of reference by extending the scope of its
examination of Article 5 to include Article 6 of the SPS Agreement;
(c)whether the Panel erred in law in finding that the measure at issue, as it applies to
ocean-caught Pacific salmon, is not based on a risk assessment, and that Australia
has therefore acted inconsistently with Article 5.1, and, by implication, Article 2.2
of the SPS Agreement;
(d)whether the Panel erred in law in finding that Australia has acted inconsistently
with Article 5.5, and, by implication, Article 2.3 of the SPS Agreement;
(e)whether the Panel erred in law in finding that Australia has acted inconsistently
with Article 5.6 of the SPS Agreement; and
(f)whether the Panel correctly allocated and applied the burden of proof, conducted an
objective assessment of the matter, erred in admitting or considering certain
evidence, and failed to accord Australia due process in denying Australia's request
to submit a third written submission.
1. The appellant, Canada, raises the following issues in this appeal:
(a)whether the Panel erred in law in its application of the principle of judicial economy
and in failing to extend its assessment of Canada's claims under Articles 5.5 and 5.6
of the SPS Agreement to other Canadian salmon; and
(b)whether the Panel erred in law in not finding a violation of Article 2.3, first
sentence, independently from its finding that Australia has acted inconsistently with
Article 5.5 of the SPS Agreement.

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IV.Terms of Reference
A.The Measure and Product at Issue
1. The first question we address is whether the Panel failed to interpret correctly its terms of
reference with respect to the measure and the product at issue in this dispute. In its request for the
establishment of a panel, Canada identified the measure and the product at issue as follows:
 The Australian Government's measures prohibiting the importation
of fresh, chilled or frozen salmon (the "Australian measures" or the
"measures") include Quarantine Proclamation 86A, dated
19 February 1975, and any amendments or modifications to it. The
measures adversely affect the importation of Canadian salmon.
22
2. With regard to the measure at issue, the Panel concluded in paragraph 8.19 of its Report that:
 … according to our terms of reference, the measure we need to
examine in this dispute is QP86A as implemented or confirmed by
the 1988 Conditions, the 1996 Requirements and the 1996 Decision
and this in so far as it prohibits the importation into Australia of
fresh, chilled or frozen salmon.
3. In coming to that conclusion, the Panel considered in paragraph 8.18 of its Report that the 1988
Conditions:
23
 … in effect deny the importation of commercial quantities of salmon
product not heat-treated as prescribed. The 1988 Conditions can, in
that sense, also be said to constitute a measure "prohibiting the
importation of fresh, chilled or frozen salmon" as referred to in the
Panel request. For the above reasons, we consider that also the 1988
Conditions fall within our terms of reference.
 With regard to the 1996 Requirements
24
, the Panel subsequently considered:
 ... the same reasoning as that developed above for the 1988
Conditions applies. We thus consider that the 1996 Requirements
fall within our terms of reference.
25

22WT/DS18/2, 10 March 1997.

23
Supra., footnote 3.

24
Ibid.

25
Panel Report, para. 8.18.

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4. Later in the Panel Report, in examining whether the SPS measure at issue was based on a risk
assessment as required by Article 5.1 of the SPS Agreement, the Panel found that:
 ... From a trade perspective (focusing on what product cannot enter
the Australian market) the measure at issue in effect constitutes an
import prohibition on, inter alia, fresh, chilled and frozen salmon.
However, if we approach the measure at issue to determine its
sanitary aspects (focusing on what is required for the product to be
allowed

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seemingly decided that its terms of reference cover all forms of salmon product processed from the
'initial' product, i.e., fresh salmon."
32
 Australia contends that the Panel extended its terms of
reference beyond the SPS measure at issue, i.e., the import prohibition on fresh, chilled or frozen
salmon
33
, by including the heat-treatment requirement which applies only to smoked salmon and
salmon roe.
34
 Australia argues that the Panel, by characterizing a quarantine measure for smoked
salmon as a sanitary aspect of a trade measure for fresh, chilled or frozen salmon (the "other side"
of a single coin)
35
, demonstrated "sharply flawed logic".
36
 According to Australia, it is not a
consequence of the requirement that smoked salmon be heat-treated that imports of fresh, chilled or
frozen salmon are prohibited. Australia stresses that smoked salmon and fresh, chilled or frozen
salmon are different products and that the quarantine measures for each are not "two sides of the
same coin".
37
7. With regard to the product at issue in this dispute, we note that the Panel explicitly stated that
heat-treated products fall outside the product coverage of this dispute.
38
 Furthermore, it is clear
from the Panel Report that the Panel only considered "fresh, chilled or frozen salmon". We,
therefore, conclude that Australia's claim that the Panel exceeded its terms of reference by
considering products outside its terms of reference and, in particular, heat-treated products, is
without merit.
8. With regard to the measure at issue, we note that QP86A provides, in relevant part:
 NOW THEREFORE I, …, the Governor-General of Australia, …,
hereby, …
 (d)prohibit the importation into Australia of dead fish of the
sub-order Salmonidae, or any parts (other than semen or ova) of fish
of that sub-order, in any form unless
 (i)prior to importation into Australia the fish or parts
of fish have been subject to such treatment as in the opinion

32Australia's appellant's submission, para. 62.
33Australia's appellant's submission, para. 65.
34Australia's appellant's submission, para. 23. Further, in para. 24 of its appellant's submission,
Australia argues that the Panel erred by construing the measure at issue as a measure "in effect", rather than a
measure "as applied", implying that the measure at issue was some sort of disguised import prohibition – in
the form of a measure that applied to products outside its terms of reference (i.e., the heat-treatment
requirement applied to smoked salmon and salmon roe).
35
Panel Report, para. 8.95.
36Australia's appellant's submission, para. 78.
37
Ibid.
38
Panel Report, para. 8.24.

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of the Director of Quarantine is likely to prevent the
introduction of any infectious or contagious disease, or
disease or pest affecting persons, animals or plants; and

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 (ii)the Director of Quarantine or a person authorized by
him has, by instrument in writing, consented to the
importation and the instrument is produced to a Collector …
or to a quarantine officer. (emphasis added)
 It is clear from the wording of QP86A that it establishes an import prohibition on salmon. This is
not disputed; both parties agree that fresh, chilled or frozen salmon has not been allowed to enter
Australia since QP86A came into force.
39
9. Although QP86A imposes an import prohibition, it delegates authority to the Director of
Quarantine to allow imports which have been subject to such treatment as is likely, in his opinion,
to prevent the introduction of any disease. On the basis of this delegated authority, the Director of
Quarantine issued the currently applicable 1988 Conditions.
40
 The 1988 Conditions were
construed by the Panel to apply not only to smoked salmon, but also to other categories of salmon,
including fresh, chilled or frozen salmon. In the view of the Panel, this interpretation is justified by
the title and the first paragraph of the 1988 Conditions. The title reads:
 Conditions for the Importation of Salmonid Meat and Roe into
Australia.
 Paragraph 1 reads:
 All uncanned salmon and trout meat and salmon roe will require a
quarantine permit to enter Australia.
10. As the Panel saw it, neither the title nor paragraph 1 specifies that the 1988 Conditions deal
only with smoked salmon. However, upon closer scrutiny, it appears that this interpretation
misreads the actual scope of the 1988 Conditions. They provide that:
 (a)the importation of all salmonids other than canned salmon requires a
quarantine permit
41
;
 (b)the application for such permit must state the temperature and duration at
which the salmon-trout is smoked, or the roe is heated
42
;

39With the exception of the importation of small quantities of fresh, chilled or frozen salmon allowed
for scientific or taxidermy purposes. Panel Report, para. 8.95.

40
Supra., footnote 3. These 1988 Conditions replaced the 1983 Guidelines for the Importation of
Smoked Salmon and Trout into Australia.

41
1988 Conditions, para. 1.

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 (c)for salmon which is not treated as above-provided, the AQIS will consider
variations to these requirements which could take into account the effect of any
auxiliary processing such as "flash-baking", "par-boiling", "gamma irradiation",
"brining" or "freezing" where the effectiveness of this process in inactivating
organisms can be demonstrated
43
;
 (d)for the importation of consignments of smoked salmon meat under 5
kilograms in weight, there is no need for a quarantine permit, but the prescribed
processing is still required.
44
11. The 1996 Requirements confirm subparagraph (d) above, but modify the labelling requirement
for consignments of smoked salmon under 5 kilograms in weight, as prescribed in the 1988
Conditions.
45
12. We agree with Australia that the heat-treatment requirement mentioned in the 1988 Conditions
applies only to smoked salmon, and that these Conditions exempt heat-treated smoked salmon and
salmon roe from the import prohibition laid down in QP86A. Fresh, chilled or frozen salmon falls
under the import prohibition of QP86A, as confirmed by the 1996 Decision of the Director of
Quarantine. Fresh, chilled or frozen salmon is not, and cannot be, subjected to heat treatment. As
a matter of fact, heat treatment would destroy fresh, chilled or frozen salmon. As the Panel itself
explicitly stated: "heat treatment actually changes the nature of the product and limits its use.
Heat-treated salmon can obviously no longer be consumed as fresh salmon."
46
 Moreover, both
participants agree that fresh, chilled or frozen salmon is an entirely different product from heat-treated (commercially marketed as "smoked") salmon.
47
13. We recall that the Panel stated that the measure at issue in this dispute "is QP86A as
implemented or confirmed by the 1988 Conditions, the 1996 Requirements and the 1996 Decision,
and this in so far as it prohibits the importation into Australia of fresh, chilled or frozen salmon".
48

42
1988 Conditions, paras. 2 and 8. In para. 3 of the 1988 Conditions, a table of an approved
temperature-time relationship is set out.

43
1988 Conditions, para. 5.

44
1988 Conditions, para. 9.
45
Supra., footnote 3.
46
Panel Report, para. 8.182.
47Responses by Australia and Canada to questions at the oral hearing.
48
Panel Report, para. 8.19.

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As indicated above, the Panel interpreted its terms of reference to include the 1988 Conditions, by
considering them to constitute a measure "prohibiting the importation of fresh, chilled or frozen
salmon" unless heat-treated as prescribed.
49
 We recall that in the context of its examination of
whether Australia's measure was consistent with Article 5.1, the Panel treated the import

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Article 6 of the SPS Agreement
1. The next issue we address is whether the Panel exceeded its terms of reference by extending
the scope of its examination of Article 5 to include Article 6 of the SPS Agreement.
2. In the request for the establishment of a panel, Canada requested that the Panel consider and
find that: (a)The Australian measures are inconsistent with: (i)the Agreement on the Application of
Sanitary and Phytosanitary Measures, and in particular
Articles 2, 3 and 5 thereof; (ii)the General Agreement on Tariffs and Trade
1994, and in particular Articles XI and XIII thereof; (b)the application of the Australian measures nullifies
or impairs the benefits accruing to Canada pursuant to the
Agreement Establishing the World Trade Organization.
51
3. In the context of examining the third element of Article 5.5, i.e., the existence of discrimination
or a disguised restriction on international trade resulting from the arbitrary or unjustifiable
distinction in the levels of sanitary protection in different situations, the Panel took into account
three "warning signals" and three "additional factors".
52
 The third of these "additional factors"
concerns the Panel's doubts on whether Australia applies "similarly strict" sanitary standards to the
internal movement of salmon within Australia as it does on imports of salmon.
53
 In the context of
its brief and inconclusive discussion on Australia's internal controls on the movement of salmon,
the Panel noted:

... that the other reasons provided by Australia to justify the absence
of any internal restrictions on the movement of salmon products, in
particular from Victoria to other parts of Australia ... would seem to
be equally valid in support of allowing imports of salmon products
into specific parts of Australia.
54

51WT/DS18/2, 10 March 1997.
52
Panel Report, para. 8.19.

53
Panel Report, para. 8.155.

54
Panel Report, para. 8.156.

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4. In a footnote to this paragraph, the Panel referred to Article 6.1 of the SPS Agreement and
stated:
 We note that in this respect Article 6 of the SPS Agreement
provides: "Members shall ensure that their sanitary ... measures are
adapted to the sanitary ... characteristics of the area - whether all of
a country, part of a country, or all or parts of several countries - ...
to which the product is destined. In assessing the sanitary or
phytosanitary characteristics of a region, Members shall take into
account, inter alia, the level of prevalence of specific diseases or
pests, the existence of eradication or control programmes, and
appropriate criteria or guidelines which may be developed by the
relevant international organizations".
55
5. Canada's request for the establishment of a panel did not include a claim of violation of Article
6 of the SPS Agreement. The Panel's terms of reference are determined by Canada's request for the
establishment of a panel. We, therefore, agree with Australia that Article 6 of the SPS Agreement
is not within the terms of reference of the Panel. However, we disagree with Australia that the
Panel exceeded its terms of reference in quoting Article 6.1 in a footnote, attached to a paragraph
in which the Panel examined a violation of Article 5.5. More precisely, we reject Australia's
contention that the Panel, by merely referring to Article 6.1 in a footnote, made an implied finding
of inconsistency with Article 6. In our view, the statement of the Panel with regard to Article 6, in
footnote 430 of its Report, is similar in character to the statement of the panel in United States –
Shirts and Blouses, with regard to the powers of the Textile Monitoring Body ("TMB"). India
appealed from this statement, but we found it to be "purely a descriptive and gratuitous comment
providing background concerning the Panel's understanding of how the TMB functions".
56
 We did
not consider that statement to be "a legal finding or conclusion" which the Appellate Body "may
uphold, modify or reverse". Likewise, we consider that in this case, the Panel's statement in
footnote 430 of its Report regarding Article 6.1 of the SPS Agreement is a purely gratuitous

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V.The SPS Agreement
A.Preliminary Observation
1. The Panel made separate analyses and findings on ocean-caught Pacific salmon and on other
Canadian salmon. With respect to other Canadian salmon, the Panel found that Australia, by
maintaining the measure at issue, without even purporting to conduct or rely on a risk assessment,
has acted inconsistently with Articles 5.1 and 2.2 of the SPS Agreement.
57
 This finding is not
appealed. The Panel limited its further examination and findings of violations of Articles 5.1, 5.5,

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'based on' a risk assessment," and that, therefore, Australia has acted inconsistently with Article 5.1
and, by implication, Article 2.2 of the SPS Agreement.
60
3. Australia appeals from the Panel's finding that the measure in dispute was not based on a risk
assessment. In the view of Australia, this finding is vitiated by the Panel's conclusion that the SPS
measure in dispute is the heat-treatment requirement rather than the import prohibition.
4.

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Communities – Poultry")
64
, and United States – Import Prohibition of Certain Shrimp and Shrimp
Products.
65
7. As we have reversed the Panel's finding that the SPS measure at issue, erroneously identified as
the heat-treatment requirement, is not based on a risk assessment, we believe that -- to the extent
possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel
record -- we should complete the legal analysis and determine whether the actual SPS measure at
issue, i.e., Australia's import prohibition on fresh, chilled or frozen ocean-caught Pacific salmon,
is based on a risk assessment.
8. In examining whether Australia's import prohibition is consistent with Article 5.1, we first have
to address whether the 1996 Final Report is, indeed, as Australia contends, a risk assessment within
the meaning of Article 5.1 of the SPS Agreement. After a detailed analysis of the requirements of
the SPS Agreement relating to risk assessments, and a detailed analysis on whether the
1996 Final Report fulfils these requirements, the Panel assumed -- without making a finding on
this issue -- "that the 1996 Final Report meets the requirements of a risk assessment set out in
Articles 5.1 and 5.2".
66
 We do not believe it appropriate to base our examination of Article 5.1 on
this assumption made by the Panel that the 1996 Final Report is a proper risk assessment. We
must, therefore, address this question ourselves. This is possible, because the Panel made all the
factual findings necessary to enable us to examine whether the 1996 Final Report meets the
requirements of a risk assessment under Article 5.1 of the SPS Agreement.
9. Paragraph 4 of Annex A of the SPS Agreement defines two types of "risk assessment". We
agree with the Panel that the type of risk assessment which is required in this case is the type
defined in the first part of paragraph 4 of Annex A
67
, which reads as follows:
 Risk Assessment - The evaluation of the likelihood of entry,
establishment or spread of a pest or disease within the territory of an

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10. On the basis of this definition, we consider that, in this case, a risk assessment within the
meaning of Article 5.1 must: (1)identify the diseases whose entry, establishment or spread a Member wants
to prevent within its territory, as well as the potential biological and economic
consequences associated with the entry, establishment or spread of these diseases; (2)

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the same meaning as "probability".

71

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be based on a risk assessment since there is a risk (i.e., a possibility
of an adverse event occurring), however remote, associated with
most (if not all) imports.
77
In its third participant's submission, the European Communities states that it finds this statement
perplexing. The European Communities is concerned that what the Panel affirmed might be
misconstrued to mean that "zero risk" as an appropriate level of protection is not a choice open to
Members under the SPS Agreement. The statement by the Panel quoted above is not appealed, and
we merely note that it is important to distinguish -- perhaps more carefully than the Panel did --
between the evaluation of "risk" in a risk assessment and the determination of the appropriate level
of protection. As stated in our Report in European Communities – Hormones, the "risk" evaluated
in a risk assessment must be an ascertainable risk; theoretical uncertainty is "not the kind of risk
which, under Article 5.1, is to be assessed."
78
 This does not mean, however, that a Member cannot
determine its own appropriate level of protection to be "zero risk".
1. Applying our three-pronged test set out in paragraph 128 above, to the 1996 Final Report in
order to determine whether that Report meets the requirements of a risk assessment within the
meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, we note that the Panel
found that the 1996 Final Report identifies the diseases whose entry, establishment or spread
Australia wants to prevent as well as the potential biological and economic consequences
associated with the entry, establishment or spread of such diseases. The Panel, therefore,
concluded that "the 1996 Final Report meets the first requirement of a risk assessment".
79
 We
agree with the Panel.
2. With regard to the second requirement for a risk assessment of the type applicable in this case,
namely, the evaluation of the likelihood of entry, establishment or spread of the diseases of
concern and of the associated potential biological and economic consequences, we note that the
Panel stated in paragraph 8.82 of its Report: … the 1996 Final Report uses the words probability, possibility and
likelihood on different occasions and evaluates elements of
probability for some of the diseases of concern.
277
 (emphasis added)
 277 At the meeting with experts advising the Panel Australia stated that "we
contend we have conducted a probability risk assessment" and implied that
assessing risk as low or small is a statement of probability (Transcript, para.
155).

77
Panel Report, para. 8.81.
78Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 186.
79
Panel Report, para. 8.73.

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Page 76 After citing some passages from the 1996 Final Report which evaluate elements of probability
80,
the Panel concluded: Considering the evidence before us, we note that the
1996 Final Report addresses some elements of both probability and
possibility. We shall, therefore, assume - without making a finding
on this issue - that it meets the requirement set out above.
81
(emphasis added)
3. We believe, however, that on the basis of the facts found by the Panel, it could, and should,
have come to the conclusion that the 1996 Final Report does not contain the "evaluation of the
likelihood of entry, establishment or spread" of the diseases of concern "and of the associated
potential biological and economic consequences" as required by paragraph 4 of Annex A of the
SPS Agreement. As we have already emphasized, some evaluation of the likelihood is not
enough.
82
4. In arriving at our conclusion that the 1996 Final Report does not meet the second requirement
of a risk assessment of the type applicable in this case, we rely, in particular, on the Panel's factual
findings in paragraph 8.83 of its Report: … that the 1996 Final Report (as stated by several of the experts
advising the Panel
284
) lends more weight to the unknown and
uncertain elements of the assessment than the 1995 Draft Report (on
which the 1996 Final Report is based). This, on occasions, results in
general and vague statements of mere possibility of adverse effects
occurring; statements which constitute neither a quantitative nor a
qualitative assessment of probability.
285

284
 Wooldridge answers, p.6, quoted in para. 8. and Rodgers answers, p.1
("As such, the 1995 report is a more useful document, in the sense of an
internal risk assessment exercise, since it 'evaluates' the data to conclude
that a negligible risk exists, while at the same time recognising that the
overall risk of disease introduction cannot be quantified. The final report
seems to lend more weight to the unknown elements of the assessment and
as such is more cautious, which results in an outcome closer to the
'unacceptable' rather than the 'negligible but acceptable' end of the scale").
285
 This led the experts advising the Panel on this issue to the conclusion
that the 1996 Final Report does not appropriately assess probability as is
required in their view. See Burmaster's answer to Panel Question 1,
Burmaster answers, p.1; Rodgers, Transcript, para. 26 ("[The
1996 Final Report] assesses risks on a disease-by-disease basis but in a

80The Panel cited only a passage in the Executive Summary, two passages with respect to two
diseases (Aeromonas salmonicida and Parvicapsula
 sp.), and a passage from the disease agent conclusions.
See Panel Report, para. 8.82.
81
Panel Report, para. 8.83.
82
Supra., para. 124.

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textural form and does not assign any probabilities that would be needed to
reach a conclusion. In this respect, therefore, I think, it possibly does fall
short of determining any probability based on the information available")
and Wooldridge, Transcript, para. 55 ("... since [the 1996 Final Report]
looks only at the possibility of the unwanted outcomes of infection and
disease importation, rather than the probability, in my opinion, it does not in
any event fulfil the essential requirements of a risk assessment").
5. We might add that the existence of unknown and uncertain elements does not justify a
departure from the requirements of Articles 5.1, 5.2 and 5.3, read together with paragraph 4 of
Annex A, for a risk assessment. We recall that Article 5.2 requires that "in the assessment of risk,
Members shall take into account available scientific evidence". We further recall that Article 2,
entitled "Basic Rights and Obligations", requires in paragraph 2 that "Members shall ensure that
any sanitary … measure … is based on scientific principles and is not maintained without
sufficient scientific evidence, except as provided for in paragraph 7 of Article 5." As we stated in
European Communities – Hormones, "Articles 2.2 and 5.1 should constantly be read together.
Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2
impart meaning to Article 5.1."
83
6. We, therefore, come to the conclusion that the 1996 Final Report does not meet the second
requirement of the type of risk assessment applicable in this case, i.e., the evaluation of the
likelihood of entry, establishment or spread of the diseases of concern and of the potential
associated biological and economic consequences.
7. We turn now to the third requirement of a risk assessment within the meaning of Article 5.1
and the first definition in paragraph 4 of Annex A of the SPS Agreement, namely, the evaluation of
the likelihood of entry, establishment or spread of a disease according to the SPS measures which
might be applied. We agree with the Panel that the measures which might be applied are those
which reduce the risks of concern, and are referred to in the 1996 Final Report as risk reduction
factors. We note that the Panel observed that the 1996 Final Report examines a large number of
different risk reduction factors for each of the 24 diseases of concern
84
, and we note that the Panel
came to the following factual finding:

83Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 180.

84
Panel Report, para. 8.89. These risk reduction factors are: "restricting zone of origin, species of
origin, life cycle stage; pre and post shipping quarantine; product testing with tests having high sensitivity;
processing, maturation and storage for specified time and temperature; treatments, (e.g., heating,
disinfection); restricting the destination; vaccination; and certification."

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 For most of these risk reduction factors, the 1996 Final Report
provides some evaluation of the extent to which these factors could
reduce risk.
85
 (emphasis added)

85
Panel Report, para. 8.89.

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8. With regard to the quarantine policy options considered to reduce the total risk associated
with all diseases of concern, the Panel, arrived at these factual findings:
 … that the 1996 Final Report does not substantively evaluate the
relative risks associated with these different options. Even though
the definition of risk assessment requires an "evaluation ...
according to the sanitary ... measures which might be applied", the
1996 Final Report identifies such measures but does not, in any
substantial way, evaluate or assess their relative effectiveness in
reducing the overall disease risk.
86
 (emphasis added)
 Thereafter, the Panel stated:
 Considering the evidence before us, we recall that the
1996 Final Report addresses and to some extent evaluates a series
of risk reduction factors, in particular, on a disease-by-disease basis.
We shall, therefore, assume - without making a finding on this issue
- that the 1996 Final Report … does make such evaluation according
to and taking into account the sanitary measures or options -
considered to reduce the alleged risk - which might be applied.
87
(emphasis added)
9. We believe that the above assumption is not justified by the Panel's factual findings in
paragraphs 8.89 and 8.90 of its Report. On the basis of its factual findings, the Panel should have
come to the conclusion that the 1996 Final Report does not fulfil the third requirement for the type
of risk assessment applicable in this case, i.e., it does not contain the required evaluation of the
likelihood of entry, establishment or spread of the diseases of concern according to the SPS
measures which might be applied. We recall that, contrary to the Panel, we consider that some
evaluation of the likelihood is not enough.
88
10. We conclude, on the basis of the factual findings made by the Panel and the requirements for a
risk assessment as set forth above, that the 1996 Final Report meets neither the second nor the third
requirement for the type of risk assessment applicable in this case, and, therefore, that the
1996 Final Report is not a proper risk assessment within the meaning of Article 5.1 and the first
definition in paragraph 4 of Annex A.

86
Panel Report, para. 8.90.

87
Panel Report, para. 8.91.
88
Supra., para 124.

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11. Inasmuch as we have found that the 1996 Final Report is not a proper risk assessment, and
since it was the only risk assessment put forward by Australia, we conclude that the measure at
issue, i.e., the import prohibition on fresh, chilled or frozen salmon, is not based on a risk
assessment as required by Article 5.1 of the SPS Agreement, and, therefore, that Australia has
acted inconsistently with Article 5.1 of the SPS Agreement.
12. We note that the Panel, after reiterating our statement on the relationship between Articles 2.3
and 5.5 in European Communities – Hormones, went on to say:
 … Articles 5.1 and 5.2 ... "may be seen to be marking out and
elaborating a particular route leading to the same destination set out
in" Article 2.2. Indeed, in the event a sanitary measure is not based
on a risk assessment as required in Articles 5.1 and 5.2, this measure
can be presumed, more generally, not to be based on scientific
principles or to be maintained without sufficient scientific evidence.
We conclude, therefore, that if we find a violation of the more
specific Article 5.1 or 5.2 such finding can be presumed to imply a
violation of the more general provisions of Article 2.2. We do
recognize, at the same time, that given the more general character of
Article 2.2 not all violations of Article 2.2 are covered by Articles
5.1 and 5.2.
89
13. We agree with the Panel, and, therefore, conclude that, by maintaining an import prohibition on
fresh, chilled or frozen ocean-caught Pacific salmon, in violation of Article 5.1, Australia has, by
implication, also acted inconsistently with Article 2.2 of the SPS Agreement.
C.Article 5.5 of the SPS Agreement
1. The next issue we address is whether the Panel erred in law in finding that Australia has acted
inconsistently with Article 5.5 of the SPS Agreement.
2. Following our Report in European Communities – Hormones
90
, the Panel considered:
 ... that three elements are required in order for a Member to act
inconsistently with Article 5.5:
 -the Member concerned adopts different appropriate levels of
sanitary protection in several "different situations";
 -those levels of protection exhibit differences which are
"arbitrary or unjustifiable"; and

89
Panel Report, para. 8.52.

90Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 214.

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 -the measure embodying those differences results in
"discrimination or a disguised restriction on international
trade".
91
3. The Panel found that all three conditions are fulfilled and therefore concluded that:

Since all three elements of Article 5.5 are present in this case, we
find that Australia, by maintaining the measure at issue, acts
inconsistently with its obligations under Article 5.5. Given our
earlier finding - that a violation of the more specific Article 5.5 can
be presumed to imply a violation of the more general Article 2.3 -
we find that Australia, to that extent, also acts inconsistently with
Article 2.3.
92
4. Australia appeals from this finding of inconsistency with Article 5.5 and, by implication,
Article 2.3 of the SPS Agreement. Without challenging the Panel's three-step legal test for
inconsistency with Article 5.5 as such, Australia contends that the Panel has made a series of errors
of law in the interpretation and application of the test.
93
 Australia argues that the Panel, in its
application of Article 5.5, exceeded its terms of reference, erred in the allocation and application of
the burden of proof, failed to make an objective assessment of the matter as required by Article 11
of the DSU and made a number of substantive errors in its interpretation and application of Article
5.5. The first of these claims has already been dealt with in Part IV of our Report; the second and
third claims are dealt with in Sections A and B of Part VI. In this section we focus exclusively on
the substantive errors of law Australia claims the Panel made in its interpretation and application of
each of the three elements of Article 5.5 of the SPS Agreement.
1.First element of Article 5.5
1. With regard to the first element of Article 5.5, namely, the existence of distinctions in
appropriate levels of protection in different situations, the Panel cited our Report in European
Communities – Hormones, where we stated that "situations … cannot, of course, be compared,
unless they are comparable, that is, unless they present some common element or elements
sufficient to render them comparable".
94
 The Panel found that:
 ... in the circumstances of this dispute, we can compare situations
under Article 5.5 if these situations involve either a risk of "entry,

91
Panel Report, para. 8.108.

92
Panel Report, para. 8.160.
93Australia's appellant's submission, paras. 146 ff.

94Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R para. 217.

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establishment or spread" of the same or a similar disease or of the
same or similar "associated biological and economic consequences"
and this irrespective of whether they arise from the same product or
other products.
95
 (emphasis added)
2. On this basis, the Panel determined that the import prohibition on fresh, chilled or frozen
salmon for human consumption and the admission of imports of (i) uncooked Pacific herring, cod,
haddock, Japanese eel and plaice for human consumption; (ii) uncooked Pacific herring, Atlantic
and Pacific cod, haddock, European and Japanese eel and Dover sole for human consumption;
(iii) herring in whole, frozen form used as bait ("herring used as bait"); and (iv) live ornamental
finfish, are "different" situations which can be compared under Article 5.5 of the SPS Agreement.
96
3. Australia argues that the Panel erred by considering that situations are "different", i.e.,
"comparable", if these situations involve either a risk of entry, establishment or spread of the
same or a similar disease, or a risk of the same or similar "associated potential biological and
economic consequences".
97
 Australia contends that the Panel has imputed a meaning to the term
"risk" which conflicts with the ordinary meaning of the term as used in its context and in the light
of the object and purpose of the SPS Agreement. According to Australia, the "risk" to be
examined is the risk evaluated in the risk assessment, namely, the risk of entry, establishment or
spread of several different diseases and of the associated potential biological and economic
consequences.
98
4. Situations which involve a risk of entry, establishment or spread of the same or a similar
disease have some common elements sufficient to render them comparable under Article 5.5.
Likewise, situations with a risk of the same or similar associated potential biological and economic
consequences also have some common elements sufficient to render them comparable under
Article 5.5. We, therefore, consider that for "different" situations to be comparable under Article
5.5, there is no need for both the disease and the biological and economic consequences to be the
same or similar. We recognize that, as pointed out by Australia, the risk which needs to be
examined in a risk assessment, pursuant to Article 5.1 and the first definition of risk assessment of
paragraph 4 of Annex A, is the risk of both the entry, establishment or spread of a disease and the
associated potential biological and economic consequences. However, we fail to see how this can

95
Panel Report, para. 8.117.
96
Panel Report, para. 8.121. Hereafter, we refer to these groups of imports as "other fish and fish
products".
97Australia's appellant's submission, paras. 155 ff, referring to the Panel Report, para. 8.117.
98Australia's appellant's submission, paras. 159 ff.

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be of relevance to the question of comparability of different situations under Article 5.5 which is
the issue addressed by the Panel. We, therefore, conclude that the Panel was correct in stating that
situations can be compared under Article 5.5 if these situations involve either a risk of entry,
establishment or spread of the same or a similar disease, or a risk of the same or similar "associated
potential biological and economic consequences".
5. Moreover, we note that the Panel examined and concluded, with respect to each of the four
comparisons, that there is a risk of entry, establishment or spread of the same or similar diseases
and that the risk of associated potential biological and economic consequences is the same or
similar.
99
6. Australia also argues that the Panel erred by examining the biological and economic
consequences of the "introduction" of diseases rather than the biological and economic
consequences of the "entry, establishment or spread" of diseases.
100
 According to Australia, the
Panel's interpretation of "entry, establishment or spread" as "introduction" is contrary to the SPS
provisions on risk assessment, i.e., Articles 5.1 to 5.3 and Annex A.
101
 We note that it is clear
from the context of the relevant Panel discussion, that the Panel merely used the word
"introduction" as a short hand expression for "entry, establishment or spread". It explicitly
defined the consequences of disease introduction as "the consequences of a disease once
established in a country".
102
7. Furthermore, even if there were to be a difference between the consequences of "disease
introduction" and the consequences of the "entry, establishment and spread of a disease", we note
that for the comparability of situations under Article 5.5, nothing requires us to look at the latter
and not at the former. We recognize that the definition of a risk assessment requires a risk
assessment to evaluate the consequences of the "entry, establishment and spread of a disease" but
we fail to see how this can be of relevance to the question of the comparability of different
situations under Article 5.5.
8. Australia finally contends that the Panel erred in determining that its examination on the
comparability of different situations must be limited solely to those disease agents positively

99
Panel Report, para. 8.121.
100Australia's appellant's submission, para. 168, referring to the Panel Report, para. 8.121. We recall
that Australia's claims relating to the burden of proof and Article 11 of the DSU are dealt with in Part VI of
this Report.
101Australia's appellant's submission, para. 168.
102
Panel Report, para. 8.121.

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detected. According to Australia, the Panel diminished Australia's right to a cautious approach to
determine its own appropriate level of protection. Australia argues that the Panel failed to interpret
the provisions of Article 5.5 in their context and in the light of the object and purpose of the
SPS Agreement. According to Australia, the terms "likelihood" and "potential" in regard to the
definition of "risk assessment" contained in paragraph 4 of Annex A, and the terms "scientific
principles" and "sufficient scientific evidence" contained in Article 2.2, make it clear that the basic
SPS right set out in Article 2.1 to take SPS measures necessary for the protection of animal life or
health, is not contingent on positive scientific evidence of disease detection.
103
9. We note that, contrary to what Australia argues, the Panel did not limit its examination under
Article 5.5 to diseases positively detected in fresh, chilled or frozen ocean-caught Pacific salmon.
On the contrary, it appears clearly from Annex 1 to the Panel Report, entitled "The Four
Comparisons under Article 5.5", that the Panel examined diseases of concern which, according to
Australia, may be carried by fresh, chilled or frozen ocean-caught Pacific salmon but which have
not yet been positively detected in this type of salmon.
104
 We also note that the Panel stated
explicitly that:
 ... To the extent that both the other products and the salmon products
further examined are known to be hosts to one of these disease
agents or - for the salmon products - give rise to an alleged concern
for that disease agent, they can be associated with the same kind of
risk, namely a risk of entry, establishment or spread of that
disease.
105
 (emphasis added)
10. In addition, we believe that for situations to be comparable under Article 5.5, it is sufficient for
these situations to have in common a risk of entry, establishment or spread of one disease of
concern. There is no need for these situations to have in common a risk of entry, establishment or
spread of all diseases of concern. Therefore, even if the Panel had excluded from its examination
some diseases of concern not positively detected in fresh, chilled or frozen ocean-caught Pacific
salmon, this would not invalidate its finding in paragraph 8.121 on comparable situations under
Article 5.5.

103

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11. We, therefore, uphold the Panel's finding in paragraph 8.121 of its Report that the import
prohibition on fresh, chilled or frozen salmon for human consumption and the admission of
imports of other fish and fish products are "different" situations which can be compared under
Article 5.5 of the SPS Agreement.
106
2.Second element of Article 5.5
1. With regard to the second element of Article 5.5, namely, the existence of arbitrary or
unjustifiable distinctions in appropriate levels of protection in different situations, the Panel began
its analysis by noting that in view of the difference in SPS measures and corresponding levels of
protection for salmon products, on the one hand, and the four categories of other fish and fish
products, on the other, one might expect some justification for this difference, such as a higher risk
from imported salmon.
107
 However, as the Panel noted:
 ... the arguments, reports, studies and expert opinions submitted to
us in this respect - rather than pointing in the direction of a higher
risk related to ...[ocean-caught Pacific salmon], in order to justify
the stricter sanitary measures imposed for these products - all
provide evidence that the two categories of non-salmonids [herring
used as bait and live ornamental finfish], for which more lenient
sanitary measures apply, can be presumed to represent at least as

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3. Australia argues that the Panel erred in determining that its examination under Article 5.5,
second element, must be limited solely to those disease agents positively detected in ocean-caught
Pacific salmon. Australia raises the same objections to this limitation as it did in the context of the
first element discussed above.
110
4. We do not agree with Australia that the Panel excluded diseases of concern which have not
been positively detected in ocean-caught Pacific salmon from its examination under Article 5.5.
The Panel explicitly took into account diseases which have not been positively detected in ocean-caught Pacific salmon but had been detected in herring used as bait and live ornamental finfish.
111
In addition, we observe that the inclusion in the examination under Article 5.5, second element, of
all diseases of concern which have not been positively detected in ocean-caught Pacific salmon
would logically have led to the inclusion of all diseases of concern which have not been positively
detected in herring used as bait and live ornamental finfish. Due to the lack of reliable scientific
information, this exercise would have become highly speculative and, moreover, would probably
not have changed the Panel's finding in paragraph 8.141 on the "arbitrary or unjustifiable" character
of the distinctions in the levels of protection.
5. Australia determined explicitly that its appropriate level of protection with respect to ocean-caught Pacific salmon is "a high or 'very conservative' level of sanitary protection aimed at
reducing risk to 'very low levels', 'while not based on a zero-risk approach'."
112
 The level of
protection reflected in Australia's treatment of herring used as bait and live ornamental finfish is
definitely lower. We note the Panel's factual finding that herring used as bait and live ornamental
finfish can be presumed to represent at least as high a risk - if not a higher risk - than the risk
associated with ocean-caught Pacific salmon.
113
 Therefore, we uphold the Panel's finding in
paragraph 8.141 of its Report to the extent that the Panel found that the second element of Article
5.5 is fulfilled.
3.Third element of Article 5.5
1. With regard to the third element of Article 5.5, i.e., that the arbitrary or unjustifiable
distinctions in levels of protection result in "discrimination or a disguised restriction on
international trade", we note that the Panel identified three "warning signals" as well as three "other

110
Supra., para. 150.
111
Panel Report, para. 8.140.
112
Panel Report, para. 8.107.
113
Panel Report, para. 8.134 quoted in relevant part in para. 154 of this Report.

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factors more substantial in nature" ("additional factors").
114
 The Panel considered that each of
these "warning signals" and "additional factors" can be taken into account in its decision on the
third element of Article 5.5. In paragraph 8.159 of its Report, it concluded:
 On the basis of all "warning signals" and factors outlined above,
considered cumulatively, ... the distinctions in levels of protection
imposed by Australia for, on the one hand, ... [ocean-caught Pacific
salmon] and, on the other hand, herring ... use[d] as bait and live
ornamental finfish, ... result[...] in "a disguised restriction on
international trade", in the sense of the third element of
Article 5.5.
115
 (emphasis added)
2. Australia contends that the Panel made a number of substantive errors of law in using these
"warning signals" and "additional factors" to come to its conclusion on the third element of Article
5.5.
116
3. The first "warning signal" the Panel considered was the arbitrary or unjustifiable character of
the differences in levels of protection.
117
 It noted what we stated in European Communities -
Hormones:
 ... the arbitrary or unjustifiable character of differences in levels of
protection [...] may in practical effect operate as a "warning" signal
that the implementing measure in its application might be a
discriminatory measure or might be a restriction on international
trade disguised as an SPS measure for the protection of human life
or health".
118
 The Panel, therefore, considered that:
 ... In this dispute, ... the arbitrary character of the differences in
levels of protection is a "warning signal" that the measure at issue
results in "a disguised restriction on international trade".
119

114
Panel Report, paras. 8.149 and 8.158.

115
Panel Report, para. 8.159.
116Australia also claims that the Panel exceeded its terms of reference, violated the rules on burden of
proof and failed to make an objective assessment of the matter as required by Article 11 of the DSU. These
claims are examined in Section B of Part IV and Sections A and B of Part VI of this Report.

117
Panel Report, para. 8.149.

118Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 215.

119
Panel Report, para. 8.149.

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4. According to Australia, the Panel erred in according the first "warning signal", the status of
evidence which demonstrates that the measure results in a disguised restriction on international
trade.
120
 We note however, that it appears clearly from the Panel Report, and in particular, from
the reference therein to our Report in European Communities – Hormones, that the Panel
considered the arbitrary or unjustifiable character of differences in levels of protection as a
"warning signal" for, and not as "evidence" of, a disguised restriction on international trade.
121

120Australia's appellant's submission, para. 216.
121
Panel Report, para. 8.149.

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5. The second "warning signal" considered by the Panel was the rather substantial difference in
levels of protection between an import prohibition on ocean-caught Pacific salmon, as opposed to
tolerance for imports of herring used as bait and of live ornamental finfish.
122
 The Panel noted our
statement in European Communities - Hormones that:
 ... the degree of difference, or the extent of the discrepancy, in the
levels of protection, is only one kind of factor which, along with
others, may cumulatively lead to the conclusion that discrimination
or a disguised restriction on international trade in fact results from
the application of a measure.
123
 (emphasis added)
 On that basis, the Panel stated:
 ... we do consider that the rather substantial difference in levels of
protection is one of the factors we should take into account in
deciding whether the measure at issue results in "a disguised
restriction on international trade", as argued by Canada.
124
6. Australia contends that this second "warning signal" is effectively no different in character
from the first "warning signal" and should therefore be discounted.
125
 We note, however, that in
this case the degree of difference in the levels of protection (prohibition versus tolerance) is
indeed, as the Panel stated, "rather substantial". We, therefore, consider it legitimate to treat this
difference as a separate warning signal.
7. The third "warning signal" the Panel considered was the inconsistency of the SPS measure at
issue with Articles 5.1 and 2.2 of the SPS Agreement. The Panel considered that its earlier finding
of inconsistency with Articles 5.1 and 2.2:
 ... may, together with other factors, lead to the conclusion that the
measure at issue results in a "disguised restriction on international
trade". Indeed, considering these violations of Articles 5.1 and 2.2 it
would seem that the measure at issue constitutes an import
prohibition, i.e., a restriction on international trade, "disguised" as a
sanitary measure. We do stress, however, that this additional
"warning signal" as such cannot be sufficient to conclude that the
measure results in a "disguised restriction on international trade".
126

122
Panel Report, para. 8.150.

123Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 240.

124
Panel Report, para. 8.150.
125Australia's appellant's submission, para. 217.

126
Panel Report, para. 8.151.

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8. Australia objects to the use of this inconsistency as a warning signal in the context of the third
element of Article 5.5.
127
 It argues that inconsistency with Article 5.1 cannot "presume" or pre-empt a finding under Article 5.5. We note that a finding that an SPS measure is not based on an
assessment of the risks to human, animal or plant life or health - either because there was no risk
assessment at all or because there is an insufficient risk assessment - is a strong indication that this
measure is not really concerned with the protection of human, animal or plant life or health but is
instead a trade-restrictive measure taken in the guise of an SPS measure, i.e., a "disguised
restriction on international trade". We, therefore, consider that the finding of inconsistency with
Article 5.1 is an appropriate warning signal for a "disguised restriction on international trade".
9. The first "additional factor" considered by the Panel is the fact that the two substantially
different SPS measures that Australia applies (import prohibition versus import tolerance) lead to
discrimination between salmon, on the one hand, and herring used as bait and live ornamental
finfish on the other. In the Panel's view, the concept of "disguised restriction on international
trade" in Article 5.5 includes, among other things, restrictions constituting arbitrary or unjustifiable
discrimination between certain products.
128
10. Australia contends that this first "additional factor" is merely a combination of the first two
"warning signals" and does not, therefore, constitute additional "evidence". Furthermore, Australia
argues that this first "additional factor" is based on an inappropriate analogy to Article III of the
GATT 1994 and a wrong concept of discrimination which, in the context of Article 5.5, means, in
its view, discrimination between countries.
129
 According to Australia, the first "additional factor"
should therefore be excluded.
11. We believe that the first "additional factor" should indeed be excluded from the examination of
the third element of Article 5.5. All "arbitrary or unjustifiable distinctions" in levels of protection
will lead logically to discrimination between products, whether the products are the same (e.g.,
discrimination between imports of salmon from different countries or between imported salmon
and domestic salmon) or different (e.g., salmon versus herring used as bait and live ornamental
finfish). The first "additional factor" is therefore not different from the first warning signal, and
should not be taken into account as a separate factor in the determination of whether an SPS
measure results in a "disguised restriction on international trade".

127Australia's appellant's submission, paras. 218 and 273 - 276.
128
Panel Report, para. 8.153.
129Australia's appellant's submission, paras. 219 and 277 - 280.

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12. The second "additional factor" considered by the Panel was the substantial, but unexplained
change in conclusion between the 1995 Draft Report (which recommended allowing the
importation of ocean-caught Pacific salmon under certain conditions) and the 1996 Final Report
(which recommended continuing the import prohibition). The Panel suggested that the decisive
reason for the reversal of the 1995 draft recommendation "might well have been inspired by
domestic pressures to protect the Australian salmon industry against import competition".
130
13. Australia argues that the Panel erred in considering this difference as a factor to be taken into
account in the examination of the third element of Article 5.5. Australia contends that the Panel
has incorrectly accorded a draft recommendation the status of an SPS measure and that no
provision of the SPS Agreement requires WTO Members to implement draft recommendations
absent new scientific evidence. Moreover, Australia argues that the Panel refused to consider its
arguments and evidence on the role of draft reports and recommendation in the decision-making
process of governments. Australia contends that the Panel mischaracterized the reasons for the
introduction of QP86A. In Australia's view, the Panel also erred in speculating about the presence
and role of lobbying in Australia's decision to adopt the 1996 Final Report.
131
14. We consider Australia's arguments to be without merit. First, we note that paragraph 1 of
Annex A of the SPS Agreement defines a sanitary measure of the type relevant in this dispute as a
measure applied to protect animal life or health within the territory of a Member from risks arising
from the entry, establishment or spread of diseases. In the light of this definition, the Panel was
correct to consider the recommendation of the 1995 Draft Report to allow under certain conditions
the importation of ocean-caught Pacific salmon to be a recommendation of an SPS measure.
15. Second, we note that the Panel did not at any point state that WTO Members are obliged to
implement draft recommendations absent new scientific evidence. It did not introduce such
obligation. We note that the Panel explicitly acknowledged that the substantial but unexplained
reversal of the 1995 draft recommendation does not constitute, in itself, sufficient proof that the
measure results in a disguised restriction on trade.
132
 The Panel merely considered that this factor
"can be taken into account cumulatively with other factors" in the examination under the third
element of Article 5.5. We agree with the Panel. We do not share Australia's criticism on the
Panel's use of the 1995 Draft Report, which the Panel used correctly as "part of the architecture" or

130
Panel Report, para. 8.154.
131Australia's appellant's submission, paras. 281 - 289.
132
Panel Report, para. 8.154.

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"part of a process"
133
 leading to the 1996 Final Report. We also do not see the relevance of the
historical reasons for the introduction of QP86A in 1975 to the examination of the substantial
changes in conclusion between the 1995 Draft Report and the 1996 Final Report.
16. The third "additional factor" considered by the Panel was the absence of controls on the
internal movement of salmon products within Australia compared to the prohibition of the
importation of ocean-caught Pacific salmon.
134
 The Panel did not come to a conclusion on the
existence or nature of this alleged difference, but considered that its doubts whether Australia
applies similarly strict sanitary standards, "though probably not conclusive as such, can also be
taken into account, cumulatively with other factors, in [its] decision on whether the measure at
issue results in a 'disguised restriction on international trade'."
135
17. Australia contends that the Panel erred in implying that consistency with Article 5.5, requires
either restrictions on the internal movement of salmon products within Australia or, alternatively,
that Australia apply import zoning to grant access to Australia for ocean-caught Pacific salmon.
136
18. We note that, as acknowledged by Australia
137
, the Panel did not conclude that the alleged
absence of internal controls constituted a violation of Article 5.5 or any other provision of the
SPS Agreement. The Panel merely stated its doubts on whether Australia applies similarly strict
sanitary standards on the internal movement of salmon products within Australia as it does on the
importation of salmon products and considered that as a factor which can be taken into account in
the examination under the third element of Article 5.5. We consider that these doubts do not carry
much weight, but we agree with the Panel that they can nevertheless be taken into consideration.
138
19. In the above analysis, we have upheld the Panel's findings on the first, second and third
"warning signals" as well as its findings on the second and third "additional factors". We have
only reversed the Panel's finding on the first "additional factor". We consider, however, that this
reversal does not affect the validity of the Panel's conclusion in paragraph 8.159 of its Report, that
the "warning signals" and "other factors", considered cumulatively, lead to the conclusion that the

133
Panel Report, footnote 418.
134
Panel Report, para. 8.155.
135
Panel Report, para. 8.158.
136Australia's appellant's submission, para. 290.
137
Ibid.
138That such doubts can be taken into consideration in the examination of the existence of
discrimination in the context of Article 5.5 does not prejudice the question of whether or not there is a
violation of Article 2.3, first sentence. This point will be taken up in Section F of Part V of this Report.

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distinctions in the levels of protection imposed by Australia result in a disguised restriction on
international trade.
20. We, therefore, uphold the Panel's finding that, by maintaining the measure at issue, Australia
has acted inconsistently with its obligations under Article 5.5, and, by implication, Article 2.3 of
the SPS Agreement.
139
D.Article 5.6 of the SPS Agreement
1. We next consider the question of whether the Panel erred in finding that the SPS measure at
issue is "more trade-restrictive than required" to achieve Australia's appropriate level of protection,
and, therefore, that Australia has acted inconsistently with Article 5.6 of the SPS Agreement.
2. After noting that Article 5.6 must be read in context and, in particular, in light of Article 2.2 of
the SPS Agreement
140
, the Panel turned its attention to the footnote to Article 5.6.
141
 In the Panel's
view, this footnote defines an SPS measure to be "more trade-restrictive than required" only if there
is another SPS measure which: (1)is "reasonably available taking into account technical and economic
feasibility"; (2)"achieves [Australia's] appropriate level of sanitary ... protection"; and (3)is "significantly less restrictive to trade" than the sanitary measure
contested. The Panel viewed these three elements as cumulative in nature.
142
3. Applying this three-pronged test to the facts in this case, the Panel first recalled that the
1996 Final Report identifies five potential quarantine policy options, ranging from heat treatment to
simple evisceration, which are: 1.Permit the importation of product effectively heat treated for
pathogens of concern -product might be heat treated prior to export, or

139
Panel Report, para. 8.160.

140
Panel Report, para. 8.165.

141
Panel Report, para. 8.167.

142
Panel Report, para. 8.167.

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Page 94 - heat treated on arrival prior to general distribution 2. Implement the recommendations of the BRS report

"Aquatic Animal Quarantine in Australia: Report of the

Scient ific Wo rking Party on Aquatic Animal Quarantine" in

par t or in full [allowing imports of salm on but, inter ali a, with

certain cer tific ati on and i nspection requir ements and only as

evis cera ted, filleted flesh].

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Page 95 3.Permit the importation of retail-ready fillets, for distribution
in raw form under specified conditions. 4.Implement the recommendations of AQIS's 1995 draft IRA,
that is, permit the importation of headless, gilled, eviscerated
product under specified conditions. 5.Permit importation of product that complies with current
international standards for trade in salmon product for human
consumption, that is, OIE recommends that product be
eviscerated and that no other risk reduction measures need be
taken.
143
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Page 96 On the basis of this premise, it stated that: ... To determine whether any of the alternative measures meet
Australia's appropriate level of protection, we should […] examine
whether these alternatives meet the level of protection currently
achieved by the measure at issue.
146 According to the Panel, Australia's "appropriate level of protection" with respect to ocean-caught
Pacific salmon can, therefore, be presumed to be at least as high as the level of protection implied
in the measure currently imposed, which in the view of the Panel is in effect and from a sanitary
perspective the heat-treatment requirement.
147
7. Following this reasoning and focusing its attention on the second quarantine policy option, i.e.,
certification, inspection, evisceration and filleting, the Panel found that there are alternative SPS
measures which would meet Australia's appropriate level of protection.
148
 It, therefore, concluded
that the second element of the test under Article 5.6 is met.
149
8. On the third element, i.e., whether any of the four quarantine policy options is significantly less
restrictive to trade than the SPS measure currently applied, the Panel pointed out that these four
alternative quarantine policy options would "allow imports" of ocean-caught Pacific salmon, albeit
under specific conditions, whereas the SPS measure currently applied amounts to an "outright
prohibition". The Panel, therefore, concluded that the third element of the test under Article 5.6 is
also met.
150
9. Having found that all three elements of the test under Article 5.6 are fulfilled, the Panel
reached the conclusion that Australia, by maintaining the measure at issue, has acted inconsistently
with Article 5.6.
151

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10. We note that, in the examination of Canada's claim under Article 5.6, the Panel referred to its
earlier ruling
152
 that "the measure in dispute is inconsistent with Article 2.2", and, therefore, the
Panel decided that it "shall not further address the legal relationship between Articles 5.6 and
2.2".
153
11. Australia appeals from the finding of inconsistency with Article 5.6. Australia does not
disagree with the three-pronged legal test under Article 5.6 as set out by the Panel. Australia
argues, however, that the Panel erred in law, particularly in the way in which it examined the
second element of the test under Article 5.6, i.e., whether any of the four options achieves
Australia's appropriate level of protection.
154
12. According to Australia, the Panel incorrectly characterized the existing measure which
currently achieves Australia's appropriate level of protection. Australia asserts that the Panel has
effectively determined that Australia's appropriate level of protection for fresh, chilled or frozen
salmon can be met by certain heat-treatment conditions.
155
 In line with its claim of error on the
SPS measure at issue, Australia argues that the Panel erred in considering that heat treatment
"constitutes" the level of protection for fresh, chilled or frozen salmon. According to Australia, its
appropriate level of protection is "explicit in the measure currently imposed, i.e., the import
prohibition on fresh, chilled or frozen salmon."
156
13. We recall that we have already concluded that the SPS measure at issue is not the heat-treatment requirement, but rather is the import prohibition on fresh, chilled or frozen salmon.
157
 As
we observed in the context of our examination of Article 5.1 of the SPS Agreement, the measure to
be examined under the SPS Agreement is, therefore, the import prohibition. The Panel had to
examine under Article 5.6 whether the import prohibition is "not more trade-restrictive than
required" to achieve Australia's appropriate level of protection. Instead, the Panel examined
whether the heat-treatment requirement is "not more trade-restrictive than required". Because of
this error, we reverse the Panel's finding in paragraph 8.183 that Australia, by maintaining the SPS
measure at issue, has acted inconsistently with Article 5.6.

152
Panel Report, para. 8.99.
153
Panel Report, para. 8.165.
154We note that Australia also claims with regard to the first element of the test under Article 5.6 that
the Panel misapplied the rules on burden of proof. We deal with this claim in Part VI of this Report.
155Australia's appellant submission, para. 306.
156Australia's appellant submission, para. 311.
157
Supra., para. 105.

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14. There is no finding nor examination in the Panel Report on the question of whether the import
prohibition on fresh, chilled or frozen salmon is "not more trade-restrictive than required" to
achieve Australia's appropriate level of protection.
15. However, in the same context and manner that we did our examination under Article 5.1 of the
SPS Agreement, we believe that - to the extent this is possible on the basis of the factual findings of
the Panel and/or facts that are undisputed between the parties - we should complete the legal
analysis and determine whether the proper SPS measure at issue, i.e., Australia's import prohibition
on fresh, chilled or frozen salmon, is "not more trade-restrictive than required" to achieve
Australia's appropriate level of protection.
16. We agree with the Panel that Article 5.6 and, in particular, the footnote to this provision,
clearly provides a three-pronged test to establish a violation of Article 5.6. As already noted, the
three elements of this test under Article 5.6 are that there is an SPS measure which:
(1)is reasonably available taking into account technical and economic feasibility;
(2)achieves the Member's appropriate level of sanitary or phytosanitary protection;
and
(3)is significantly less restrictive to trade than the SPS measure contested.
These three elements are cumulative in the sense that, to establish inconsistency with Article 5.6, all
of them have to be met. If any of these elements is not fulfilled, the measure in dispute would be
consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account

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statement is based on the Panel's premise that "the level of protection implied or reflected in a
sanitary measure or regime imposed by a WTO Member can be presumed to be at least as high as
the level of protection considered to be appropriate by that Member." We disagree with the
Panel.
3. We note that, in this case, the level of protection reflected in the SPS measure at issue, i.e.,
the import prohibition, is undisputedly a "zero-risk level" of protection. However, Australia
determined explicitly that its appropriate level of protection is:
 ... a high or "very conservative" level of sanitary protection aimed at
reducing risk to "very low levels", "while not based on a zero-risk
approach".
158
 It is clear, in this case, that the appropriate level of protection as determined by Australia is
definitely not at least as high as the level of protection reflected in the SPS measure at issue.
4. In discussing Australia's position with respect to its appropriate level of protection, the Panel
noted:
 It is for Australia to decide on ... [its appropriate level of protection],
but, again, in so doing it has to act consistently with the
SPS Agreement, in particular Articles 2, 5.1 to 5.3 and 5.6. Our
examination under Article 5.6 is not aimed at a de novo review of
what sanitary measure Australia should have chosen to achieve its
appropriate level of protection. On the other hand, we cannot
completely defer this decision to Australia and thus not give effect
to Article 5.6. Our mandate under Article 11 of the DSU requires us
to "make an objective assessment of the matter before [us],
including an objective assessment of the facts of the case".
159
5. We do not believe that Article 11 of the DSU, or any other provision of the DSU or of the
SPS Agreement, entitles the Panel or the Appellate Body, for the purpose of applying Article 5.6 in
the present case, to substitute its own reasoning about the implied level of protection for that
expressed consistently by Australia. The determination of the appropriate level of protection, a
notion defin

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6. The "appropriate level of protection" established by a Member and the "SPS measure" have to
be clearly distinguished.
160
 They are not one and the same thing. The first is an objective, the
second is an instrument chosen to attain or implement that objective.
7. It can be deduced from the provisions of the SPS Agreement that the determination by a
Member of the "appropriate level of protection" logically precedes the establishment or decision on
maintenance of an "SPS measure". The provisions of the SPS Agreement also clarify the
correlation between the "appropriate level of protection" and the "SPS measure".
8. According to Article 3.3 of the SPS Agreement: Members may introduce or maintain sanitary or phytosanitary
measures which result in a higher level of sanitary or phytosanitary
protection than would be achieved by measures based on the relevant
international standards, ... as a consequence of the level of sanitary or
phytosanitary protection a Member determines to be appropriate …
(emphasis added) Article 5 of the SPS Agreement, entitled "Assessment of Risk and Determination of the
Appropriate Level of Sanitary or Phytosanitary Protection", provides in paragraph 3: In assessing the risk to animal or plant life or health and determining
the measure to be applied for achieving the appropriate level of
sanitary or phytosanitary protection from such risk ... (emphasis
added) Paragraph 4 of Article 5 of the SPS Agreement addresses, specifically, the determination of the
appropriate level of protection in requiring that: Members should, when determining the appropriate level of sanitary
or phytosanitary protection, take into account the objective of
minimizing negative trade effects. (emphasis added)
9. The correlation between the "appropriate level of protection" and the "SPS measure" is perhaps
shown most clearly in Article 5.6 of the SPS Agreement which reads: ... when establishing or maintaining sanitary or phytosanitary
measures to achieve the appropriate level of sanitary or phytosanitary
protection, Members shall ensure that such measures are not more

160That the level of protection and the SPS measure applied have to be clearly distinguished results
already from our Report in European Communities – Hormones, WT/DS26/AB/R, WT/DS48/AB/R, adopted
13 February 1998, para. 214.

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trade-restrictive than required to achieve their appropriate level of
sanitary or phytosanitary protection ... (emphasis added)
 The words of Article 5.6, in particular the terms "when establishing or maintaining sanitary ...
protection", demonstrate that the determination of the level of protection is an element in the
decision-making process which logically precedes and is separate from the establishment or
maintenance of the SPS measure. It is the appropriate level of protection which determines the
SPS measure to be introduced or maintained, not the SPS measure introduced or maintained which
determines the appropriate level of protection. To imply the appropriate level of protection from
the existing SPS measure would be to assume that the measure always achieves the appropriate
level of protection determined by the Member. That clearly cannot be the case.
10. We, therefore, conclude that the Panel's statement that "to determine whether any of the
alternative measures meet Australia's appropriate level of protection, we should […] examine
whether these alternatives meet the level of protection currently achieved by the measure at issue"
is wrong. What is required under Article 5.6 is an examination of whether possible alternative SPS
measures meet the appropriate level of protection as determined by the Member concerned.
11. We recognize that the SPS Agreement does not contain an explicit provision which obliges
WTO Members to determine the appropriate level of protection. Such an obligation is, however,
implicit in several provisions of the SPS Agreement, in particular, in paragraph 3 of Annex B,
Article 4.1
161
, Article 5.4 and Article 5.6 of the SPS Agreement.
 162
 With regard to Article 5.6, for
example, we note that it would clearly be impossible to examine whether alternative SPS measures
achieve the appropriate level of protection if the importing Member were not required to determine
its appropriate level of protection.
12. We thus believe that the SPS Agreement contains an implicit obligation to determine the
appropriate level of protection. We do not believe that there is an obligation to determine the
appropriate level of protection in quantitative terms. This does not mean, however, that an
importing Member is free to determine its level of protection with such vagueness or equivocation
that the application of the relevant provisions of the SPS Agreement, such as Article 5.6, becomes
impossible. It would obviously be wrong to interpret the SPS Agreement in a way that would

161Reasonable questions from interested Members within the meaning of paragraph 3 of Annex B can
arise, in particular, with respect to the application of Article 4 of the SPS Agreement. Articles 4.1 and 4.2
imply, in our view, a clear obligation of the importing Member to determine its appropriate level of protection.
162
Furthermore, it could be argued that an implicit obligation for a Member to determine the
appropriate level of protection results also from Article 5.8 and Article 12.4 of the SPS Agreement.

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render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to
escape from their obligations under this Agreement.
13. While in this case Australia determined its appropriate level of protection, and did so with
sufficient precision to apply Article 5.6, we believe that in cases where a Member does not
determine its appropriate level of protection, or does so with insufficient precision, the appropriate
level of protection may be established by panels on the basis of the level of protection reflected in
the SPS measure actually applied. Otherwise, a Member's failure to comply with the implicit
obligation to determine its appropriate level of protection – with sufficient precision – would allow
it to escape from its obligations under this Agreement and, in particular, its obligations under
Articles 5.5 and 5.6.
14. We recall that the second element of the test under Article 5.6 requires us to examine whether
any of the possible alternative SPS measures identified above would achieve Australia's
appropriate level of protection. To be able to do this, first of all, we have to know what level of
protection could be achieved by each of these alternative SPS measures.
15. We note, however, as we already stated in the context of our examination of Article 5.1, that
the Panel made the following factual finding:
... the 1996 Final Report does not substantively evaluate the relative
risks associated with these different options [i.e., the five quarantine
policy options mentioned in the 1996 Final Report].[…] Even
though the definition of risk assessment requires an "evaluation …
according to the sanitary … measures which might be applied", the
1996 Final Report identifies such measures but does not, in any
substantial way, evaluate or assess their relative effectiveness in
reducing the overall disease risk.
163
1. This makes it impossible to verify in an objective manner on the basis of the
1996 Final Report, whether any of the alternative policy options discussed in this Report would
achieve Australia's appropriate level of protection for ocean-caught Pacific salmon.
2. In addition, we note that the Panel Report does not contain any other factual element which
would allow us to examine the alternative quarantine policy options, as the Panel examined them
only in comparison to the erroneous yardstick of the level of protection implied from the heat-treatment requirement. It was on this basis that the Panel made its finding that Canada had raised

163
Panel Report, para. 8.90.

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"a presumption – which has not been rebutted – that there are alternative measures available which
would meet Australia's appropriate level of protection". The Panel was however cautious to add:
 ...

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 Our finding does, therefore, not endorse any of the alternative
options we examined. It does not imply that Option 2 would
actually achieve Australia's appropriate level of protection nor does
it imply that Option 2 would be the only option which could achieve
that level.
164
3. We, therefore, are not in a position to complete the examination of the second element of the
test under Article 5.6, i.e., whether there is another measure that achieves the appropriate level of
sanitary protection.
4. We recall that because of the Panel's error of examining whether the heat-treatment
requirement, rather than the proper SPS measure at issue, i.e., the import prohibition, is "not more
trade-restrictive than required", we are compelled to reverse the Panel's finding that Australia has
acted inconsistently with Article 5.6.
165
 In reversing the Panel's finding on Article 5.6, we do not,
however, conclude that Australia did or did not violate Article 5.6. There may well be a violation
of Article 5.6, and possibly Article 2.2
166
, but we are unable to come to a conclusion on these
issues due to the insufficiency of the factual findings of the Panel and of facts that are undisputed
between the parties.
E.Articles 5.5 and 5.6 of the SPS Agreement with Respect to Other Canadian Salmon
1. The next issue which we have to address is whether the Panel erred in law by misapplying the
principle of judicial economy, in particular, in failing to extend its assessment of Canada's claims
regarding Articles 5.5 and 5.6 to other Canadian salmon.
167
2. We recall that the Panel distinguished, in its findings, between ocean-caught Pacific salmon
and other Canadian salmon. The Panel found for both ocean-caught Pacific salmon, in paragraph
8.99, and other Canadian salmon, in paragraph 8.59, that Australia, by maintaining the measure at
issue, has acted inconsistently with Article 5.1 and, by implication, Article 2.2 of the

164
Panel Report, para. 8.181.
165
Supra., para. 191.
166Article 2, entitled "Basic Rights and Obligations", requires in paragraph 2 that:
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SPS Agreement. However, the Panel limited its findings on Article 5.5 and, by implication, on
Article 2.3, as well as its findings on Article 5.6, to ocean-caught Pacific salmon.
3. The Panel justified this limitation of the product scope of its findings on Articles 5.5, 2.3 and
5.6 in the following manner: Given the fact that (1) most of the studies and reports before us, and
in particular the 1996 Final Report (Australia's only formal risk
assessment) specifically address and discuss adult, wild, ocean-caught Pacific salmon (even though the data they contain may relate
to or be relevant for other salmon) and (2) Canada itself also focused
on adult, wild, ocean-caught Pacific salmon during our proceedings,
we, in turn, concentrated our attention and questions (to both the
parties and the experts advising the Panel) on adult, wild, ocean-caught Pacific salmon. For these reasons, the evidence and
arguments before us which are relevant to Articles 5.5 and 5.6 are
centred on adult, wild, ocean-caught Pacific salmon. We do not
therefore consider it appropriate or necessary "in order to resolve the
matter in issue in the dispute"
251
 to further address the salmon
products in dispute other than those from adult, wild, ocean-caught
Pacific salmon.
168

251
 Appellate Body Report on US - Measure Affecting Imports of Woven Wool
Shirts and Blouses from India, adopted 23 May 1997, WT/DS33/AB/R, pp.17-

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on Articles 5.5 and 5.6 to ocean-caught Pacific salmon because Canada did not present sufficient
evidence to allow the Panel to make findings with regard to other Canadian salmon.
170
1.The Principle of Judicial Economy
1. As cited by the Panel, we stated in United States – Shirts and Blouses that "a panel need only
address those claims which must be addressed in order to resolve the matter at issue".
171
2. The matter at issue is set forth in the Panel's terms of reference, which are usually defined by
the request for establishment of a panel which must contain a statement of both the specific
measure at issue and the legal basis of the complaint.
172
 The standard terms of reference, used in

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implementation. If making a ruling on one claim will sufficiently determine the course of
implementation, it would be redundant for a panel to go further. However, a panel that addresses
certain claims, but declines to address others that would better frame the course of implementation
will, in Canada's view, not necessarily have resolved the matter at issue.
175
5. The principle of judicial economy has to be applied keeping in mind the aim of the dispute
settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a
dispute".
176
 To provide only a partial resolution of the matter at issue would be false judicial
economy. A panel has to address those claims on which a finding is necessary in order to enable
the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt
compliance by a Member with those recommendations and rulings "in order to ensure effective
resolution of disputes to the benefit of all Members."
177
6. In this case, for the Panel to make findings concerning violation of Article 5.1 with respect to
other Canadian salmon, without also making findings under Articles 5.5 and 5.6, would not enable
the DSB to make sufficiently precise recommendations and rulings so as to allow for compliance
by Australia with its obligations under the SPS Agreement, in order to ensure the effective
resolution of this dispute with Canada. An SPS measure which is brought into consistency with
Article 5.1 may still be inconsistent with either Article 5.5 or Article 5.6, or with both.
7. Furthermore, there is no reason, in applying the principle of judicial economy, to examine
Articles 5.5 and 5.6 for only one category of the products in dispute, i.e., ocean-caught Pacific
salmon, and not to undertake the same analysis for the other categories, i.e., other Canadian
salmon. The Panel gave no convincing reason why it examined Article 5.5 and 5.6 for only one
category of the products in dispute, i.e., ocean-caught Pacific salmon, and did not undertake the
same analysis for other categories, i.e., other Canadian salmon. The Panel's only explanation for
limiting its examination of Article 5.5 and 5.6 to ocean-caught Pacific salmon was that "the
evidence and arguments before us which are relevant to Articles 5.5 and 5.6 are centered on adult,
wild, ocean-caught Pacific salmon."
178
 (emphasis added) The Panel made no finding that Canada
has not made a prima facie case relating to its Articles 5.5 and 5.6 claims concerning other
Canadian salmon. We note that, in this respect, the case at hand presents similarities with Japan –

175Canada's appellant's submission, paras. 34 - 36.
176DSU, Article 3.7.
177DSU, Article 21.1.
178
Panel Report, para. 8.60.

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Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages") in which we considered the panel's
failure to address all the products referred to in its terms of reference to be an error of law.
179
Likewise, in the present case, the Panel's terms of reference include not only ocean-caught Pacific
salmon, but also other Canadian salmon.
8. We, therefore, find it to be an error of law that the Panel did not consider it appropriate or
necessary "in order to resolve the matter at issue" to address Article 5.5 and 5.6 with respect to
other Canadian salmon.
2.Article 5.5
(a)First element of Article 5.5
1.

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disease agents in common, or - for other Canadian salmon - , give rise to an alleged concern for a
disease agent.
182
 It did not, therefore, come to a conclusion on whether the situation regarding
other Canadian salmon and the situations regarding other fish and fish products are comparable
within the meaning of the first element of Article 5.5.
4. We do not believe, however, that the comparability of these situations under Article 5.5
depends on an exact knowledge of the nature and number of diseases positively detected or
possibly occurring in other Canadian salmon. The situation of other Canadian salmon may be the
same as that of ocean-caught Pacific salmon; it may be better or worse. The risks for the
Australian aquatic environment resulting from imports of other Canadian salmon may therefore be
identical to, lower or higher than, those arising from imports of ocean-caught Pacific salmon.
However, these differences, if there are any, do not make the comparisons with other fish and fish
products, as undertaken in the four comparisons, any less meaningful. They do not diminish the
comparability of risks for the Australian aquatic environment arising from the imports of, on the
one hand, other Canadian salmon and, on the other, other fish and fish products.
5. Furthermore, we recall that the Panel noted in the context of its examination of Article 5.5
regarding ocean-caught Pacific salmon that Australia had explicitly determined its appropriate level
of protection to be as "a high or 'very conservative' level of sanitary protection aimed at reducing
risk to 'very low levels', while 'not … a zero-risk approach' ".
183
 However, the Australian
statements on its appropriate level of protection, which were noted by the Panel, are not limited to
ocean-caught Pacific salmon, but apply to all salmon in dispute including other Canadian
salmon.
184
 We, therefore, consider that for other Canadian salmon, Australia's appropriate level
of protection is also a high or very conservative level of protection aimed at reducing risk to very
low levels, but not a zero risk level.
6. Australia did not explicitly determine the appropriate levels of protection for other fish and fish
products. We recall, however, that the importation of other fish and fish products is, under certain
circumstances, allowed. The appropriate levels of protection reflected in the SPS measures applied
to other fish and fish products are, therefore, not "very conservative" and thus different from the
appropriate level of protection for ocean-caught Pacific salmon.

182We note that Table 3 in para. 4.41 of the Panel Report lists all diseases of concern to Australia and
shows wide agreement among the parties about their occurrence in Canadian salmon. However, Table 3 does
not distinguish between ocean-caught Pacific salmon and other Canadian salmon.
183
Panel Report, para. 8.107.
184
See in addition to the references made in support of para. 8.107, i.e., footnotes 326, 327 and 328,
the earlier footnote 274 of the Panel Report.

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7. We, therefore, conclude that, with respect to other Canadian salmon, there are distinctions in
the appropriate levels of protection in different, i.e., comparable, situations and that the first
element of Article 5.5 is fulfilled.
(b)Second element of Article 5.5
1. We recall that for ocean-caught Pacific salmon, the Panel began its analysis of the second
element of Article 5.5, i.e., the existence of arbitrary or unjustifiable distinctions in appropriate
levels of protection, by noting that in view of the difference in SPS measures and corresponding
appropriate levels of protection for ocean-caught Pacific salmon, on the one hand, and the other
fish and fish products, on the other, one might expect some justification with regard to this
difference, such as higher risk related to imported salmon products. The Panel noted, however,
that the arguments, reports, studies and expert opinions, in this respect, point in the other direction.
The Panel stated that these data provide evidence that two categories of non-salmonids, for which
more lenient SPS measures apply, i.e., herring used as bait and live ornamental finfish, can be
presumed to represent at least as high a risk - if not a higher risk - than that associated with ocean-caught Pacific salmon.
185
 The Panel found that the distinctions in the levels of protection for
ocean-caught Pacific salmon, on the one hand, and herring used as bait and live ornamental finfish,
on the other, are arbitrary or unjustifiable. The Panel, therefore, concluded that the second element
of Article 5.5 is fulfilled.
186
 We recall that we have upheld this finding.
187
2. We believe that this reasoning applies also to other Canadian salmon. In our view, this
reasoning is not affected by the possibility that other Canadian salmon may represent a higher risk
for the Australian salmonid population than ocean-caught Pacific salmon. We note that the Panel
stated that the evidence submitted to it pointed in the direction of a higher risk of disease
introduction associated with imports of herring used as bait and live ornamental finfish than the
risk posed by imports of salmon products for human consumption.
188
3. We, therefore, conclude that with respect to other Canadian salmon the second element of
Article 5.5 is fulfilled.

185
Panel Report, para. 8.134.
186
Panel Report, para. 8.141.
187
Supra., para. 158.
188
Panel Report, para. 8.137.

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 (c)Third element of Article 5.5
4. We recall finally that, with regard to ocean-caught Pacific salmon, the Panel examined the third
element of Article 5.5, i.e., the existence of discrimination or a disguised restriction on
international trade, in taking into account three "warning signals" and three "additional factors".
On the basis of these "warning signals" and "additional factors", considered cumulatively, the
Panel found that the distinctions in the levels of protection imposed by Australia for ocean-caught
Pacific salmon, on the one hand, and, herring used as bait and live ornamental finfish, on the other,
result in a disguised restriction on international trade. We recall that we have upheld this
finding.
189
5. Australia's import prohibition applies to both ocean-caught Pacific salmon and other Canadian
salmon. In the context of our examination of the third element of Article 5.5, we do not see any
plausible reason why conclusions reached for ocean-caught Pacific salmon would not also be valid
for other Canadian salmon. If the arbitrary or unjustifiable distinctions in the levels of protection
for ocean-caught Pacific salmon, on the one hand, and herring used as bait and live ornamental
finfish, on the other, was correctly found to result in a disguised restriction on international trade,
the arbitrary or unjustifiable distinctions in the levels of protection for other Canadian salmon, on
the one hand, and herring used as bait and live ornamental finfish, on the other, must necessarily
also result in a disguised restriction on international trade.
6. In fact, we believe that with respect to one "warning signal", there is even more reason to
conclude that the arbitrary or unjustifiable distinctions in the levels of protection for other
Canadian salmon, on the one hand, and herring used as bait and live ornamental finfish, on the
other, result in a disguised restriction on international trade. In the context of its examination
regarding ocean-caught Pacific salmon, the Panel considered that the "insufficiency" of the
1996 Final Report, as a risk assessment reasonably supporting the SPS measure within the meaning
of Article 5.1, constitutes a "warning signal" in the examination under Article 5.5, third element.
For other Canadian salmon, there is not even the beginning of a risk assessment.
7. We thus conclude that, with respect to other Canadian salmon, the third element of Article 5.5
is also fulfilled and that Australia, by maintaining its import prohibition on all Canadian salmon,
has acted inconsistently with Article 5.5 and, by implication, with Article 2.3 of the SPS
Agreement.

189We upheld this finding although we reversed the Panel's intermediate finding on the first
"additional factor". See paras. 177 and 178 of this Report.

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3.Article 5.6
1. With regard to ocean-caught Pacific salmon, the Panel concluded that the SPS measure at issue
- which it considered to be the heat-treatment requirement - is "more trade restrictive than required"
to achieve Australia's appropriate level of protection, and therefore that Australia has acted
inconsistently with Article 5.6 of the SPS Agreement. Australia appealed this finding of the Panel.
We recall that, because of the Panel's error of examining whether the heat-treatment requirement
rather than the proper SPS measure at issue, i.e., the import prohibition, is "not more trade-restrictive than required", we reversed the Panel's finding that Australia has acted inconsistently
with Article 5.6. We note that, in reversing the Panel's finding on Article 5.6, we did not conclude
whether or not Australia's import prohibition on ocean-caught Pacific salmon is consistent with
Article 5.6. We recall that we are unable to come to a definitive conclusion on this issue due to the
insufficiency of relevant factual findings by the Panel and of facts that are undisputed between the
parties.
2. For the same reasons we are unable to come to a conclusion on the question of whether or not
the import prohibition on other Canadian salmon is consistent with Article 5.6 of the
SPS Agreement.
F.Article 2.3 of the SPS Agreement
1. The last substantive issue we address is whether the Panel erred in law in not making a finding
that Australia has acted inconsistently with Article 2.3, first sentence, independently from its
finding that Australia has acted inconsistently with Article 5.5 of the SPS Agreement.
2. The Panel's findings with respect to Article 2.3 are limited to the following statements: 8.109.... We conclude … that if we were to find that all three
elements under Article 5.5 - including, in particular, the third
element - are fulfilled and that, therefore, the more specific
Article 5.5 is violated, such finding can be presumed to imply a
violation of the more general Article 2.3. 8.160... Since all three elements of Article 5.5 are present in this
case, we find that Australia, by maintaining the measure at issue,
acts inconsistently with its obligations under Article 5.5. Given our
earlier finding - that a violation of the more specific Article 5.5 can
be presumed to imply a violation of the more general Article 2.3 -
we find that Australia, to that extent, also acts inconsistently with
Article 2.3. 8.184Since we have found that the measure in dispute is
inconsistent with the requirements of Articles 5.1, 5.5 and 5.6 and

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is, on that ground, also inconsistent with the requirements of
Articles 2.2 and 2.3, we see no need to further examine Canada's
other claims under Article 2 nor its claims under Article 3.
3. In its appeal, Canada argues that the Panel erred in applying Article 2.3, first sentence, solely
through Article 5.5, rather than focusing on this provision as an independent obligation. Canada
criticizes the Panel for not having found a violation of Article 2.3, first sentence, independently
from the finding of a violation of Article 5.5.
190
 Furthermore, Canada argues that in applying
Article 2.3, first sentence, as an afterthought to its analysis of Article 5.5, the Panel compounded
the error it had made in confining the analysis of, and the finding under, Article 5.5, to ocean-caught Pacific salmon.
191
4. With regard to Canada's second ground of appeal, we refer to Section E of Part V of our
Report, in which we deal inter alia with the Panel's failure to extend its findings on Article 5.5,
and, by implication, Article 2.3 to other Canadian salmon. In this section, we will focus on
Canada's first ground of appeal.
5. We note that the Panel indeed failed to examine Canada's claim that Australia's import
prohibition on fresh, chilled or frozen salmon violated the first sentence of Article 2.3. Canada
argued before the Panel that Australia does not control the internal movement of salmonid products
from infected states to disease-free states to protect its salmonid populations from salmonid disease
agents such as EHN. In contrast to this absence of control on the internal movement of salmonid
products, Australia completely prohibits the importation of fresh, chilled and frozen salmon.
Canada argued before the Panel that in this sense the import prohibition on fresh, chilled or frozen
salmon constitutes an arbitrary or unjustifiable discrimination between imported Canadian and
domestic Australian salmonid products, and that Australia has thereby acted inconsistently with
Article 2.3, first sentence.
6. We do not believe that the Panel, by not examining Canada's claim on Article 2.3, first
sentence, intended to deny that Article 2.3, first sentence, contains an obligation independent from
Article 5.5. We note that although the Panel stated that Article 5.5 provides for more specific and
detailed rights and obligations than the "Basic Rights and Obligations" set out in rather broad
wording in Article 2.3
192
, the Panel explicitly recognized

190Canada's appellant's submission, para. 10.
191
Ibid
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192
Panel Report, para. 8.48.

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 … that, given the more general character of Article 2.3, not all
violations of Article 2.3 are covered by Article 5.5.
193

193
Panel Report, para. 8.109.

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7. Furthermore, the Panel made it clear that it abstained from a separate examination of
Article 2.3, first sentence, because it saw no need for such an examination, having already found
that the measure in dispute is inconsistent with the requirements of Articles 5.1, 5.5 and 5.6 and is,
on that ground, also inconsistent with the requirements of Articles 2.2 and 2.3.
194
 In other words,
the Panel abstained from a separate examination of Article 2.3 on grounds of judicial economy, not
because it considered that Article 2.3, first sentence, does not contain any obligation independent
of Article 5.5.
8. According to Article 2.3, first sentence:
 Members shall ensure that their sanitary and phytosanitary measures
do not arbitrarily or unjustifiably discriminate between Members
where identical or similar conditions prevail, including between
their own territory and that of other Members. ...
9. This provision takes up obligations similar to those arising under Article I:1 and Article III:4 of
the GATT 1994 and incorporates part of the "chapeau" to Article XX of the GATT 1994. Its
fundamental importance in the context of the SPS Agreement is reflected in the first paragraph of
the preamble of the SPS Agreement.
10. We recall that the third - and decisive - element of Article 5.5, discussed above, requires a
finding that the SPS measure which embodies arbitrary or unjustifiable restrictions in levels of
protection results in "discrimination or a disguised restriction on international trade". Therefore, a
finding of violation of Article 5.5 will necessarily imply a violation of Article 2.3, first sentence, or
Article 2.3, second sentence. Discrimination "between Members, including their own territory and
that of others Members" within the meaning of Article 2.3, first sentence, can be established by
following the complex and indirect route worked out and elaborated by Article 5.5.
195
 However, it
is clear that this route is not the only route leading to a finding that an SPS measure constitutes
arbitrary or unjustifiable discrimination according to Article 2.3, first sentence. Arbitrary or
unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without
any examination under Article 5.5.
11. We now turn to the question of whether the measure at issue, i.e., the import prohibition on
fresh, chilled or frozen salmon, violates Article 2.3, first sentence.

194
Panel Report, para. 8.184.
195
In European Communities – Hormones we characterized Article 5.5 as "marking out and
elaborating a particular route leading to the same destination set out in Article 2.3" (emphasis added).
Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 212.

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12. We recall that in the context of its examination of the third element of Article 5.5, the Panel
noted that it had doubts whether Australia applies similarly strict sanitary standards on the internal
movement of salmon products within Australia as it does on the importation of salmon products.
The Panel did not come to a conclusion on this alleged difference in sanitary standards. It merely
acknowledged the arguments advanced by both Canada and Australia and stated that it saw "no
benefit in trying to compare" the risk arising from EHN as opposed to that arising from the diseases
of concern to Australia with respect to ocean-caught Pacific salmon.
196
 It also stated that it saw no
benefit in trying to compare the different measures imposed by Australia to deal with these risks.
197
The Panel's discussion is characterized by caution and an absence of factual findings.
13. In the context of an examination under Article 2.3, first sentence, it would first of all be
necessary to determine the risk to Australia's salmonid population resulting from diseases, such as
EHN, which are endemic to some parts of Australia but exotic to others. There are, however, no
factual findings by the Panel or undisputed facts between the parties on this matter. It is, therefore,
impossible for us to determine whether the import prohibition on fresh, chilled or frozen salmon,
for both ocean-caught Pacific and other Canadian salmon, constitutes an arbitrary or unjustifiable
discrimination within the meaning of Article 2.3, first sentence of the SPS Agreement.
VI.Procedural Issues
1. Australia raises a number of procedural issues concerning the Panel's conduct of the
proceedings and its examination of the case. These issues relate to the Panel's allocation and
application of the burden of proof; its duty to conduct an objective assessment of the matter
pursuant to Article 11 of the DSU; the admission of, and consideration by, the Panel of certain
evidence; and the Panel's response to Australia's request to submit a third written submission in
reply to Canada's oral statement at the second meeting of the Panel with the parties.
A.

196
Panel Report, para. 8.157.
197
Ibid.

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Burden of Proof
1. First, Australia claims that the Panel erred in its allocation and application of the burden of
proof under Articles 2 and 5 of the SPS Agreement. In paragraph 8.40 of its Report, the Panel
referred to our report in European Communities – Hormones which stated:
 The initial burden lies on the complaining party, which must
establish a prima facie case of inconsistency with a particular
provision of the SPS Agreement on the part of the defending party,
or more precisely, of its SPS measure or measures complained
about. When that prima facie case is made, the burden of proof
moves to the defending party, which must in turn counter or refute
the claimed inconsistency ...
198
 Applying this rule, the Panel found:
 In this dispute it is thus for Canada to establish a prima facie case
of inconsistency of the Australian measure at issue with each of the
provisions of the SPS Agreement Canada invokes. Once this is
done, it is for Australia to counter or refute the claimed
inconsistency. In other words, if Canada "adduces evidence
sufficient to raise a presumption that what is claimed is true, the
burden then shifts to [Australia], who will fail unless it adduces
sufficient evidence to rebut the presumption".
199
2. In addressing the various claims of Canada challenging the consistency of the measure at issue
with Articles 5.1, 5.5. and 5.6 (and, indirectly, 2.2 and 2.3), the Panel examined the evidence
submitted by Canada in support of its claims and the evidence submitted by Australia in rebuttal.
For each of these claims, the Panel came to the conclusion that Canada had established a prima
facie case of inconsistency with the relevant provisions of the SPS Agreement and that Australia
had not rebutted the presumption of inconsistency.
200
3. Australia concedes that the Panel correctly articulated the burden of proof as established by us
in United States – Shirts and Blouses and, in its specific application to the SPS Agreement,
European Communities – Hormones.
201
 However, Australia contends that the Panel "applied the
burden incorrectly"
202
 and failed to properly assess, in its consideration of the evidence before it,

198Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 98.

199
Panel Report, para. 8.40.
200
Panel Report, paras. 8.59, and 8.99 (on Article 5.1), paras. 8.137, 8.139 8.141 and 8.159 (on Article
5.5) and paras. 8.171, 8.181 and 8.182 (on Article 5.6).
201Australia's appellant's submission, para. 85.
202
Ibid.

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whether Canada had met the burden of proof in relation to its claims under Articles 5.1, 5.5 and
5.6.
203
4. It appears to us that the core of Australia's appeal on this question is not a related to the
allocation of the burden of proof, but rather how the Panel considered and weighed the evidence in
concluding that Canada had established a prima facie case of inconsistency with Articles 5.1, 5.5
and 5.6. We stated in European Communities – Hormones: Under Article 17.6 of the DSU, appellate review is limited to
appeals on questions of law covered in a panel report and legal
interpretations developed by the panel … Determination of the
credibility and weight properly to be ascribed to (that is, the
appreciation of) a given piece of evidence is part and parcel of the
fact finding process and is, in principle, left to the discretion of a
panel as the trier of facts. The consistency or inconsistency of a
given fact or set of facts with the requirements of a given treaty
provision is, however, a legal characterization issue. It is a legal
question. Whether or not a panel has made an objective assessment
of the facts before it, as required by Article 11 of the DSU, is also a
legal question which, if properly raised on appeal, would fall within
the scope of appellate review.

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but constituted an egregious error amounting to an error of law".
205
 Australia also contends that the
Panel failed to accord due deference to matters of fact put forward by parties.
206
2. Among the various allegations made by Australia, there are two which stand out. The first
concerns the consideration by the Panel of scientific studies which, according to Australia, were
either not relevant or were too general to answer the question of relative risks to the Australian
salmonid population from the entry, establishment or spread of salmonid vis-à-vis non-salmonid
products.
207
 The second is the allegation that the Panel seriously mischaracterized the process
relating to, and the character and purpose of, Australian government draft reports,
recommendations and legislation.
208
3. In our report in European Communities - Hormones, we stated: ... Clearly, not every error in the appreciation of the evidence ... may
be characterized as a failure to make an objective assessment of the
facts. ... The duty to make an objective assessment of the facts is,
among other things, an obligation to consider the evidence presented
to a panel and to make factual findings on the basis of that evidence.
The deliberate disregard of, or refusal to consider, the evidence
submitted to a panel is incompatible with a panel's duty to make an
objective assessment of the facts. The wilful distortion or
misrepresentation of the evidence put before a panel is similarly
inconsistent with an objective assessment of the facts. "Disregard"
and "distortion" and "misrepresentation" of the evidence, in their
ordinary signification in judicial and quasi-judicial processes, imply
not simply an error of judgment in the appreciation of evidence but
rather an egregious error that calls into question the good faith of a
panel. A claim that a panel disregarded or distorted the evidence
submitted to it is, in effect, a claim that the panel, to a greater or
lesser degree, denied the party submitting the evidence fundamental

205Australia's appellant's submission, para. 105. Australia's specific allegations of failure by the Panel
to undertake an objective assessment of the matter in the examination of Canada's claims under Articles 5.1,
5.5 and 5.6 are set out in the following paragraphs of Australia's appellant's submission:
- Article 5.1: paras. 142 - 144;
- Article 5.5: paras. 147, 177, 212, 225 - 297;
- Article 5.6: paras. 299 - 301, 305, 312 – 314.
206Australia's appellant's submission, para. 100. The facts put forward by Australia which, according
to Australia, the Panel failed to give due deference, relate to Australia's determination of its appropriate level
of protection, Australia's 1996 Final Report, Australia's characterization of the measure at issue and the fact
that the 1988 Conditions do not have application to fresh, chilled or frozen salmon, Australia's domestic
practices and processes in risk assessment including the role of draft reports and recommendations, and the
legal status and application of SPS measures.
207Australia's appellant's submission, paras. 168 - 183, 231 - 239 and 243 - 246.
208Australia's appellant's submission, paras. 281 - 289.

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fairness, or what in many jurisdictions is known as due process of
law or natural justice.
209
 (emphasis added)
4. We also recall our statement in European Communities – Poultry:
 An allegation that a panel has failed to conduct the "objective
assessment of the matter before it" required by Article 11 of the
DSU is a very serious allegation. Such an allegation goes to the
very core of the integrity of the WTO dispute settlement process
itself. ...
210
 (emphasis added)
5. In our view, the Panel did not "deliberately disregard", "refuse to consider", "wilfully distort"
or "misrepresent" the evidence in this case; nor has Australia demonstrated in any way that the
Panel committed an "egregious error that calls into question the good faith" of the Panel. We,
therefore, conclude that the Panel did not abuse its discretion in a manner which even comes close
to attaining the level of gravity required for a claim under Article 11 of the DSU to prevail.
6. Finally, in response to Australia's contention that the Panel failed to accord "due deference" to
matters of fact it put forward, we note that Article 11 of the DSU calls upon panels to "make an
objective assessment of the matter before it, including an objective assessment of the facts of the
case and the applicability of and conformity with the relevant covered agreements". Therefore, the
function of this Panel was to assess the facts in a manner consistent with its obligation to make
such an "objective assessment of the matter before it". We believe the Panel has done so in this
case. Panels, however, are not required to accord to factual evidence of the parties the same
meaning and weight as do the parties.
C.Admission and Consideration of Certain Evidence
1. Australia claims that the Panel erred in admitting certain evidence submitted by Canada after
7 October 1997, the deadline set by the Panel in its working procedures. According to Australia,
the Panel drew on some of this evidence in reaching its findings.

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2. With regard to the "Vose Report", the Panel stated:
 At our second substantive meeting, Australia requested us to
exclude Annex K…the "Vose Report" . . . submitted after the 7
October 1997 deadline we imposed. … [S]ince, in our view, the
Vose Report is in any event not crucial to our report, we shall not
further consider it in our examination. ...
212
3. In footnote 315 of its Report, the Panel characterized the evidence at issue in paragraph 8.98
as:
 Evidence referred to by Canada in its oral statement at the second
substantive meeting, not submitted to the Panel, but not contested by
Australia.
4. We note that the Panel explicitly stated that it would not consider the "Vose Report" in its final
examination. We also note that Australia did not demonstrate that the Panel, contrary to this
statement of the Panel, considered the "Vose Report" in its final examination. We, therefore, fail to
see how Australia could raise due process concerns about the Panel's alleged "consideration" of this
report.
5. More generally, with regard to Australia's claim that the Panel erred in admitting evidence
submitted after 7 October 1997, we note that the Working Procedures in Appendix 3 of the DSU do
not establish precise deadlines for the submission of evidence. Under the provisions of Article
12.1 of the DSU, panels are permitted to establish their own working procedures, in addition to
those set out in Appendix 3. In this case, the Panel initially set the deadline for the submission of
evidence on 7 October 1997, but later decided to admit evidence submitted after this date. We note
that Article 12.2 of the DSU provides that "[p]anel procedures should provide sufficient flexibility
so as to ensure high-quality panel reports, while not unduly delaying the panel process." However,
a panel must also be careful to observe due process, which entails providing the parties adequate
opportunity to respond to the evidence submitted. Whether the Panel afforded Australia adequate
opportunity to respond is the question addressed in the next section.
6. Finally, with regard to the evidence Canada referred to, but did not submit, we note that this
evidence was referred to in the 1996 Final Report, submitted by Australia as its risk assessment. It
must, therefore, have been known and available to Australia. We can find no error in the Panel's
consideration and admission of this evidence.

212
Panel Report, para. 8.4.

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D.Right of Response
1. Australia claims that the Panel erred in failing to accord it an opportunity to submit a formal
written rebuttal submission to respond to the oral statement made by Canada at the second meeting
of the Panel. Australia contends that Canada raised "substantially new matters" in this oral
statement.
213
2. In paragraph 8.22 of its Report, the Panel stated:

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it did not contend that the issues or claims that Canada raised were outside the Panel's terms of

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paragraph 4 of Annex A of the SPS Agreement, and that Australia, by maintaining
without a proper risk assessment, an import prohibition on fresh, chilled or frozen

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determine whether the measure at issue constitutes arbitrary or unjustifiable
discrimination within the meaning of Article 2.3, first sentence, of the
SPS Agreement;
(l)concludes that the Panel's consideration and weighing of the evidence in support of
Canada's claims relates to the Panel's assessment of the facts and, therefore, falls
outside the scope of appellate review;
(m)concludes that the Panel did not abuse its discretion contrary to its obligations
under Article 11 of the DSU;
(n)concludes that the Panel's admission and consideration of certain evidence
submitted, or referred to, by Canada does not raise due process concerns contrary
to the DSU; and
(o)concludes that since the Panel granted Australia extra time to respond to the oral
statement made by Canada at the second meeting of the Panel, the Panel did not
fail to accord due process to Australia contrary to the DSU.
1. The Appellate Body recommends that the DSB request that Australia bring its measure found
in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the
SPS Agreement, into conformity with its obligations under that Agreement.

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Sig ned i n the original at Geneva this 7

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day of October 1998 by:

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Claus-Dieter E hlermann

Presiding Mem ber

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Christopher Beeby Said El-Naggar

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